Supreme Court, U.S.
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No. 10-492

In The
Supreme Court of the United States

YOUA VANG LEE, Trustee for the Heirs and Next-of-Kin of Fong Lee, Decedent,

Petitioner,

v.

OFFICER JASON ANDERSEN and THE CITY OF MINNEAPOLIS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether an individual is deprived of the right to a fair trial by the introduction and repeated intimation of highly prejudicial and inadmissible gang affiliation evidence.

II. Whether delegating the "objective reasonableness" prong of the qualified immunity test to the jury improperly usurps the judiciary's power to decide questions of law and otherwise indelibly sways the jury to reach a particular result.

III. Whether expert testimony is improperly excluded when the expert was qualified in forensic video analysis and the testimony would have assisted the jury in determining if the images presented at trial were accurate and faithful representations of reality.

LIST OF PARTIES TO THE PROCEEDING

YOUA VANG LEE, *PETITIONER*

OFFICER JASON ANDERSEN, *RESPONDENT*

CITY OF MINNEAPOLIS, MINNESOTA, *RESPONDENT*

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PETITION FOR WRIT OF CERTIORARI

Youa Yang Lee respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The United States Court of Appeals for the Eighth Circuit issued its opinion on August 12, 2010. *Lee v. Andersen*, No. 09-2771, 2010 WL 3168627 (8th Cir. August 12, 2010). This opinion is reproduced at App. 1. The United States District Court for the District of Minnesota, Minneapolis, issued its opinion on May 13, 2009. *Lee v. Andersen*, No. 07-1205 (PAM/JSM), 2009 WL 1346147 (D. Minn. May 13, 2009). This opinion is reproduced at App. 24.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on August 12, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1245(1).

RULES AND STATUTORY PROVISIONS INVOLVED

Pursuant to Supreme Court Rule 14.1(f), the pertinent text of the rules and statutory provisions implicated by this case appear in the Appendices as

follows: 28 U.S.C. § 1983, *set forth* at App. 46; FED. R. EVID. 403, *set forth* at App. 47; FED. R. EVID. 404, *set forth* at App. 47; FED. R. EVID. 702-04, *set forth* at App. 48.

STATEMENT OF THE CASE

On July 22, 2006 at approximately 6:30 PM, decedent Fong Lee, was gunned down by a Minneapolis police officer, Jason Andersen. The vast majority of this shooting incident was captured on a school security surveillance video camera where the shooting occurred. Petitioner Youa Lee ("Lee") was appointed trustee of Fong Lee's estate and asserted claims under 42 U.S.C. § 1983 against Andersen and the City of Minneapolis (collectively, "the City").

I. Statement of the Facts

Minneapolis Police Officers Randomly Accosted Fong Lee

On what started as a beautiful day in mid-July 2006, a nineteen-year-old boy, Fong Lee, was riding his bicycle with friends Nhia Lor, Phong Xiong, Bobby Vang and Too Xiong. Trial Transcript, Vol. III at 468-70; 482-84; 504-08; 525-26. The boys ended up riding their bicycles into the Cityview Elementary School parking lot in Minneapolis, Minnesota. *Id.* at 470-71. Two neighbors who lived adjacent to the school, Vajying Houa Vue and Karl Hunter, witnessed a Minneapolis police car driven by Officer

Jason Andersen rapidly approach the boys. *Id.* at Vol. I, 43-44. According to Andersen, he approached the boys "just to see what would happen," and neither he nor his partner, Trooper Craig Benz, witnessed the bicyclists do anything improper, suspicious, or illegal. *Id.* at 290, 317-72. Notwithstanding, the officers began pursuing the bicyclists, driving them up onto the school's grassy playground. *Id.* at 291, 372. Without provocation, Andersen hit Fong Lee with his police car, knocking Fong Lee off his bike. *Id.* at 48, 77.

Fong Lee is Shot and Killed by Jason Andersen[1]

After Andersen knocked Fong Lee off his bicycle, the boys began to run from the officers. *Id.* at 48, 76-78, 528-29. The officers chased after the boys on foot and drew their weapons on Fong Lee. *Id.* at 300-01, 374-75. Contrary to the testimony of Vue and Hunter, the officers claimed Fong Lee was given a gun by one of the other bicyclists and had the gun in his right hand while he ran from the police. *Id.* at 294, 299, 301, 304, 374. Trooper Benz testified that although he

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[1] Petitioner refers to Jason Andersen throughout as Andersen rather than Officer Andersen as he has been fired from his position for a second time after willfully lying to the review board about his actions as a member of the defunct Metro Gang Strike Force, when he was accused of kicking a teenager in the head during an arrest. *See* David Hanners, *Embattled Minneapolis Cop Jason Andersen Fired, Again*," TWINCITIES.COM PRESS (Sept. 23, 2010), http://www.twincities.com/ci_16148832?source=most_viewed&nclick_check=1.

believed Fong Lee had a gun, he never saw Fong Lee point the weapon at Andersen at any time during the course of their interaction. *Id.* at 375, 405.

As Fong Lee ran from the officers, Andersen took his first three shots at Fong Lee. *Id.* at 303, 313-20. Fong Lee fell to the ground and Andersen shot him an additional five times. *Id.* at 374-76, 397, 404. Fong Lee was shot in his back, his right buttock, his left buttock, his right heel, his right side, his chest, his right thigh and his left hand. *Id.* at 774, 778, 781-85, 801. Fong Lee died on the school grounds from the gunshot wounds.

The Crime Scene Evidence was Inconsistent with Andersen's Testimony

Security tape footage from the school recorded the final moments of Fong Lee's encounter with police. *Id.* at 1-907. The video does not show that Fong Lee was holding a weapon. *Id.* Moreover, even though Andersen claimed Fong Lee was holding a gun in his right hand, the gun—a .380 Russian-made Baikol semi-automatic gun—ended up resting in the grass, approximately three feet away from his left hand. *Id.* at 325. Instead of securing the gun, seeing if medical aid could be administered to Fong Lee, interacting with Trooper Benz or going to meet the arriving police officers, Andersen stayed in a staged tactical position with his gun still drawn on Fong Lee, and stayed there for a material period of time until a number of back-up officers arrived. *Id.* at

327. According to Andersen, he stayed in this staged position to rebut any accusations about planting a gun on Fong Lee. *Id.* No fiber, hair, blood, fingerprints, or smudges were found on the gun and there was no bullet in the chamber of the gun. *Id.* at 596-98.

Approximately ten days after Fong Lee's death, Minneapolis Police Officer Lt. Michael Fossum was contacted by the Minneapolis Police Homicide department and informed of a serious issue with the gun allegedly recovered next to Fong Lee's body. *Id.* at Vol. I, 206. According to Minneapolis Police Department records, the gun recovered near Fong Lee's left hand on July 22, 2006 was actually the same gun that had been previously recovered by the Minneapolis Police Department in February of 2004 (i.e., 2 years and 5 months before Fong Lee's death), and kept in the police department's possession since that time. *Id.* at 172-184. The gun recovered in the Fong Lee homicide, which appeared to be the gun already recovered by Minneapolis Police in 2004, was owned by a gentleman named Dang Her. *Id.* at 172-184.

II. Nature of the Proceedings

The District Court Erroneously Admitted Evidence of Lee's Gang Affiliation

Shortly thereafter, Petitioner Youa Lee, trustee to Fong Lee's estate, filed suit against the City of Minneapolis and Andersen in the United States District Court for the District of Minnesota, Minneapolis,

asserting claims under 42 U.S.C. § 1983. Lee's claims included *Monell* claims; a state wrongful death cause of action; state and federal claims for vicarious liability; negligent hiring, retention and supervision; and state claims for assault, battery, and the intentional infliction of emotional distress.

Lee filed a pretrial motion to exclude any and all evidence of Fong Lee's gang membership because such evidence was irrelevant to the case and unfairly prejudicial to Lee. Plaintiff's Motion in Limine at 1-2. The City responded with three tenuous reasons to support relevancy: (1) criminal gang members tend to have a shorter life span and contribute financially less to family members; therefore, the evidence of gang membership was relevant to disprove damages in Lee's wrongful death action; (2) the evidence was relevant to impeach the testimony of Fong Lee's family members if they denied his gang affiliation; and (3) the evidence was relevant to show that Fong Lee had a gun on July 22, 2006, that he was spending time with friends who had guns, and that he fled from the officers because he had a gun. Defendants' Memorandum in Response to Plaintiff's Motions in Limine at 1. The district court appropriately rejected the first two grounds, but wrongly admitted the evidence to show that Fong Lee had access to a gun and to establish his motive for running from the police.

The District Court Erroneously "Shut the Gate" on Relevant Expert Testimony

The district court further refused to admit the testimony of Richard Diercks, a qualified expert under Fed. R. Civ. P. 26(a)(2). Diercks used digital video recording and processing technology to increase the contrast of the video images captured by the surveillance camera and clarified seven individual frames covering the crucial 1.3 seconds at the end of the foot pursuit. Diercks would have testified, based upon his knowledge and experience in the video imaging field, that "Fong Lee did not have a firearm in his right hand during the moments before the shooting incident on July 22, 2006. Fong Lee did not have any object in his right hand during the moments before the shooting incident." Deposition of Richard Diercks at 15. The district court nevertheless excluded Diercks's testimony, reasoning "the jury does not need assistance in determining whether they can see a gun or any other object in the decedent's hand." D. Ct. Order of May 13, 2009, at 10.

The District Court Submitted Qualified Immunity Questions to the Jury

At the close of trial, and over Lee's objections, the district court submitted the following questions to the jury:

> (1) Do you find by a preponderance of the evidence in favor of plaintiff, Youa Vang Lee, trustee for the heirs and next-of-kin

> of Fong Lee, decedent, and against Officer Jason Andersen on the claims of excessive force?;
>
> (2) Was defendant Officer Jason Andersen objectively reasonable in his belief that the use of deadly force was necessary to protect himself or another from apparent death or great bodily harm?

Trial Transcript, Vol. VI at 986-7. Lee specifically objected to the second question, arguing the issue of qualified immunity is a question of law within the purview of the judiciary—not the jury. *Id.* Lee further challenged the district court's failure to define "objectively reasonable." The district court overruled Lee's objections and submitted the questions to the jury, detailing the instructions contained therein. *Id.* The jury found that Andersen did not use excessive force against Fong Lee and the district court entered judgment in favor of Andersen and the City of Minneapolis. *Lee v. Andersen*, No. 07-1205 (PAM/JSM), 2009 WL 1346147 (D. Minn. May 13, 2009).

Lee Appealed the District Court's Judgment

Lee appealed to the United States Court of Appeals for the Eighth Circuit, positing the district court erred in admitting evidence of Fong Lee's gang affiliation, in excluding the expert testimony that Fong Lee did not have a gun in his hand, and in formulating the special verdict form. The court of appeals ultimately affirmed the decision of the district court, however, the court of appeals held that

"[g]iven its low probative value and the danger of unfair prejudice, the gang affiliation evidence should have been excluded." *Lee v. Andersen*, No. 09-2771, 2010 WL 3168626, at *6 (8th Cir. August 12, 2010). This petition for writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

I. The Appellate Court's Refusal to Rectify the District Court's Erroneous Admission of Highly Prejudicial and Inherently Inflammatory Evidence of Fong Lee's Gang Affiliation Defies Federal Precedent.

> There can be no justice in a trial by jurors inflamed by passion, warped by prejudice, awed by violence, menaced by the virulence of public opinion or manifestly biased by any influences operating either openly or insidiously to such an extent as to poison the judgment and prevent the freedom of fair action.

Groppi v. Wisconsin, 400 U.S. 505, 511 n.12 (1971) (citation omitted). Notwithstanding this Court's directive, the Eighth Circuit Court improperly determined the district court's admission of gang related evidence "did not affect Lee's substantial rights or have more than a slight influence on the verdict."[2] *Lee*

[2] The Eighth Circuit properly concluded that the probative value of the gang affiliation evidence was outweighed by its prejudicial effect. FED. R. EVID. 403. The court, however,

(Continued on following page)

v. Andersen, No. 09-2771, 2010 WL 3168626, at *6 (8th Cir. August 12, 2010); *see also United States v. Gustafson*, 528 F.3d 587, 591 (8th Cir. 2008) (mandating error is not harmless where it affects the substantial rights of the party or has "more than a *slight* influence on the verdict") (emphasis added). The Eighth Circuit's opinion, however, obliterates the types of evidentiary protections that have been safeguarded by Congress and this Court for well over thirty-five years. *See* FED. R. EVID. 404(a) (prohibiting the admission of prejudicial character evidence since the Rule's promulgation in 1975); *Dawson v. Delaware*, 503 U.S. 159 (1992) (overturning the lower court's decision to admit gang affiliation evidence). Paradoxically, the Eighth Circuit touted the dangers of gang affiliation evidence and rendered the district court's admission of the evidence error under Rule 403 while simultaneously minimizing the impact of such error to Lee's case. *Lee v. Andersen*, 2010 WL 3168626, at *6. In so doing, the Eighth Circuit diminished federal precedent and created an evidentiary exception that swallows Rule 403, allowing parties, like the Respondents, to circumvent the unfairly prejudicial nature of gang affiliation evidence. *See* FED. R. EVID. 403; *see also Irvin*, 87 F.3d at 864. Reducing the improper admission of gang affiliation evidence to mere harmless error ignores the prejudicial nature of gang related evidence, which is

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incorrectly held that "[a]ny error in admitting [the gang affiliation evidence] was harmless."

harmful because of—not in spite of—its invidious character.

Moreover, the Eighth Circuit's decision to downgrade a grave violation of Fong Lee's rights to harmless error deviates from the vast majority of federal appellate courts, which recognize "[t]he substantial risk of unfair prejudice attached to gang affiliation evidence, noting such evidence is likely to be damaging in the eyes of the jury and that gangs suffer from poor public relations." *United States v. Irvin*, 87 F.3d 860, 864 (7th Cir. 1996); *see also United States v. Jobson*, 102 F.3d 214, 219 (6th Cir. 1999) ("[C]ourts must treat gang affiliation with care, since jurors are likely to look unfavorably on a[n] [individual's] membership in a gang."). Without a decision from this Court to adequately guide the federal courts on the permissible use and impact of gang affiliation evidence, errors will continually appear. Such errors improperly saddle litigants, like Lee, with the threat of unfair prejudice, jeopardizing their fundamental right to a fair trial by an impartial tribunal. Accordingly, this Court should grant Lee's Petition for Writ of Certiorari to resolve the confusion surrounding the admission and effect of gang affiliation evidence as seen in the varied opinions of the courts below in addressing these issues.

A. The City Repeatedly Referred to Fong Lee's Gang Membership in Order to Prove He Had a Gun at the Time He was Shot and Killed by Andersen.

Federal Rule of Evidence 404(a) prohibits evidence of a person's character or trait of character for the purpose of proving action in conformity therewith on a particular occasion. Subsection (b) further provides "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." FED. R. EVID. 404(b). Notwithstanding these evidentiary precepts, the City recast this case as one focusing on gang affiliation, anathema to the reasonable citizen. The City's use of Fong Lee's gang affiliation evidence, however, is exactly the type forbidden by the Federal Rules of Evidence, i.e., because Fong Lee was a gang member he was more likely to possess a gun, and therefore possessed the gun when he was shot and killed. Evidence that Fong Lee was a gang member guaranteed provoking an emotional response in the jury and tended to adversely affect the jury's attitude toward Fong Lee, wholly apart from its judgment as to Fong Lee's possession of the gun.

The circuit courts generally refuse to find harmless error where, as here, the trial is close and the effect of the district court's error could have easily been the difference between the plaintiff winning or losing his suit. *See Mike's Train House, Inc. v. Lionel, L.L.C.*, 471 F.3d 398, 409-10 (6th Cir. 2006) ("[I]f one cannot say, with fair assurance, . . . that the judgment

was not substantially swayed by the error, it is impossible to decide that substantial rights were not affected.") (citation omitted); *see also United States v. Bledsoe*, 531 F.2d 888, 892 (8th Cir. 1976) (holding the cumulative effect of errors cannot be considered harmless if it means the difference between prevailing in the dispute). Here, the record demonstrates both that Respondents' case was far from overwhelming and that Respondents wrongfully introduced evidence of Fong Lee's gang membership to establish Lee's possession of the gun.

In the absence of any physical evidence linking Fong Lee to the gun, witness testimony was critical to the outcome of this case. The record reflects police found no trace evidence—no blood, no fiber, no fingerprints, and no smudges—on the gun allegedly used by Fong Lee. *See Lee v. Andersen*, 2010 WL 3168628, at *3 (noting there was no trace evidence found on the gun). The record also reflects that the parties bitterly disputed whether the gun found near Fong Lee's body was in fact ever actually in Fong Lee's possession before he was shot and killed.

Nevertheless, the court of appeals summarily dispensed with Petitioner's arguments without addressing the contested facts and evidence when it erroneously stated: "suffice it to say that the weapon was identified by its owner as having been stolen from his home in mid-February and that it was never in custody of the Minneapolis Police Department prior to its being recovered at the scene of the shooting." *Id.* This Court's conclusion is fundamentally

inconsistent with testimony in this case, which leads only to the opposite conclusion—namely, that the weapon was identified by its owner as having been stolen from his home in mid-February and that it was always in the custody of the Minneapolis Police Department prior to its being recovered at the scene of the shooting. *See id.* In particular, Dang Her, the owner of the gun allegedly used by Lee, testified that the Minneapolis Police Department notified him that officers recovered the gun and that it remained in police custody. Dang Her's testimony highlights the parties' fervent dispute over a vital element of the case—whether Lee had a gun in his possession—and supports Appellant's position that the gun was solely and exclusively in the possession of the Minneapolis Police Department and was planted as a "throw down" to cover up the unjustifiable and unprovoked murder of Fong Lee by Officer Andersen.

After the evidence of gang membership was allowed by the district court, this record is replete and robust with Respondents' strategic use of that gang membership, revealing much about how it was used to push the jury away from a fair and objective evaluation of the evidence. Respondents' theme was both consistent and transparent throughout trial: One less Hmong gang member for you good law-abiding citizens on the jury to worry about. *See* Trial Transcript, Vol. III-VI, discussed *infra* at 4-6. Fong Lee's gang affiliation was used by Respondents to put a non-existent gun in his hand, and give the jury a pass on having to fairly deliberate a hot-button and

difficult issue: Did a Minneapolis Police Officer shoot an unarmed man without provocation? *See* FED. R. EVID. 404(a) (prohibiting the admission of evidence relating to a person's character or a trait of character "for the purpose of proving action in conforming therewith on a particular occasion"); *see also United States v. Sloan*, 65 F.3d 149, 151 (10th Cir. 1995) (acknowledging that gang affiliation may be viewed as evidence of a character trait). Respondents repeatedly stressed Fong Lee's gang membership at trial, beginning with the cross-examination of Bobby Vang, extending to the cross-examinations of Too Xiong and Nhia Lor, and finally culminating in an excessively prejudicial closing argument.

For example, the first question Respondents posed to Vang on cross-examination was "Mr. Vang, Fong Lee was a member of a gang; isn't that right?" Trial Transcript, Vol. III at 475. Respondents proceeded to furnish Vang with a copy of his deposition testimony and asked again, "So Fong Lee was a member of a gang?" *Id.* at 476. Vang responded: "If you want to make it seem like that, if that's what you're trying to say." Respondents asked Vang a third time, "Was Fong Lee a member of a gang?" Vang replied "Yeah," and Respondents solicited the name of the gang and the meaning of the gang's name. *Id.*

Respondents' cross-examination of Too Xiong mirrored this exchange. Xiong was asked a series of questions regarding Fong Lee's attachment with the OMB gang, including: "Fong Lee is a member of a street gang; isn't that true?"; "And what street gang

is that?"; "And he was a member of OMB on the date of his death; isn't that true?"; "And you knew that because you've been friends with Fong Lee for a long time?" *Id.* at 515. Respondents likewise bombarded Lor with questions regarding Fong Lee's gang affiliation and elicited injurious testimony that Lor tried to stay away from the gang in order to "[t]ry to get [his] life straight." *Id.* at 532-537. Additionally, Respondents focused on Fong Lee's ties to OMB in closing argument to the jury, iterating:

> We do know that [Fong Lee] was a gang member. We heard from several of his acquaintances. Nhia Lor admitted that Fong Lee was a gang member, a member of OMB. And despite Mr. Lor's attempt to recast OMB as some sort of civil organization or glee club, or something, it's clear that both of these two individuals belonged to a gang . . . It wasn't a civic organization, ladies and gentlemen. These are gang members.

Trial Transcript, Vol. VI at 917.

Although Respondents represented to the district court that they wanted to use these inflammatory insinuations to prove Fong Lee had access to a gun and establish his motive for fleeing from police, they failed to identify how Fong Lee's gang association provided him access to a gun, possession of this gun, or how it created a motive for Fong Lee's flight. Instead, each time Respondents referenced gangs, it was for the purpose of proving Fong Lee had a gun simply because he was a gang member. Presenting

evidence of gang membership for this purpose has been condemned explicitly and implicitly by the federal circuit courts and presenting such evidence repeatedly, as was done in this case, is almost always harmful error. *See, e.g., United States v. Roark*, 924 F.2d 1426, 1434 (8th Cir. 1991) ("[T]he government's attempt to tie Petitioner's guilt directly to his association with the Hells Angels Motorcycle Club constitutes reversible error."); *United States v. Irvin*, 87 F.3d 860, 865 (7th Cir. 1996) (holding that membership in a motorcycle gang was not probative and did not assist the jury in determining commission of the disputed act).

B. Evidence of Fong Lee's Gang Affiliation Improperly Influenced the Jury.

Although several circuits permit the admission of gang affiliation evidence when it is relevant to a material issue in the case, the court below takes an unprecedented leap from these cases, equating the admission of relevant gang affiliation evidence with the harmless error of such evidence when it is patently inadmissible. *See, e.g., United States v. Abel*, 469 U.S. 45, 49 (1984); *United States v. Santiago*, 46 F.3d 885, 889 (9th Cir. 1995). Rather than simply advancing Respondents' flawed objective to prove access and motive, the effect of Fong Lee's gang affiliation was likely pervasive, injecting bias into the jury box and resulting in a verdict based on something other than the evidence. *United States v. Mullins*, 446 F.3d 750,

759 (8th Cir. 2006) (noting evidence is improper if it is likely to inflame the jury and result in a verdict based on something other than the evidence). "[E]vidence of gang membership and activity is inherently prejudicial because that evidence appeals to the jury's instinct to punish gang members." *Pfau v. Ault*, 409 F.3d 933, 940 (8th Cir. 2005) (citation omitted).

This Court previously acknowledged the dangers of gang affiliation evidence in *Dawson v. Delaware*, 503 U.S. 159 (1992). In *Dawson*, this Court reversed the petitioner's death sentence because the gang evidence introduced at his trial had no relevance to the issues decided in that proceeding. *Id.* at 162. The *Dawson* court questioned whether the evidence of the petitioner's membership in the Aryan Brotherhood was employed simply because the jury would find the beliefs of the gang morally reprehensible, as the evidence was not tied in anyway to the petitioner's charged crimes.[3] *Id.* at 166-67.

Following *Dawson,* both the Sixth and Seventh Circuits have emphasized the uniquely prejudicial

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[3] The *Dawson* court did not conduct a harmful error analysis because "[t]he question of whether the wrongful admission of the Aryan Brotherhood evidence at sentencing was harmless [was] not before [the Court] at [that] time." *Id. Dawson*, therefore, left the harmful error determination open for consideration by the lower court on remand. *Id.* The harmful error analysis here, unlike that in *Dawson*, is properly before this Court.

character of gang related evidence. *See Jobson*, 102 F.3d at 219; *United States v. Sargent*, 98 F.3d 325, 328 (7th Cir. 1996); *Irvin*, 87 F.3d at 864. In *Jobson*, the Sixth Circuit cautioned that courts must tread carefully in admitting gang affiliation evidence, as jurors are likely to look unfavorably on a party's membership in a gang. *Jobson*, 102 F.3d at 219. Likewise, the Seventh Circuit in *Irvin* opined:

> Gangs generally arouse negative connotations and often invoke images of criminal activity and deviant behavior. There is therefore always the possibility that a jury will attach a propensity for committing crimes to [those] who are affiliated with gangs or that a jury's negative feelings towards gangs will influence its verdict.

Irvin, 87 F.3d at 865. Therefore, evidence of an individual's gang membership, by its very nature, clouds the jury's objectivity and poisons the jury's judgment. *See Jobson*, 102 F.3d at 219; *Sargent*, 98 F.3d at 328; *Irvin*, 87 F.3d at 864.

Moreover, the jury's susceptibility to undue influence was especially high in the present case due to Minnesota's unique demographics. *See* Jason H. Lee, Note, *Dislocated and Deprived: A Normative Evaluation of Southeast Asian Criminal Responsibility and the Implications of Societal Fault*, 11 MICH. J. RACE & L. 671, 676-77 (2006) ("Minnesota has one of the largest Southeast Asian communities in the country outside of California. . . . Consequently, it has also witnessed a rapid boost in Southeast Asian gang

members and violence over the last ten years."). Over the past decade, the Minnesota Gang Strike Force mounted an aggressive opposition to Hmong gang violence and, in the process, the media has saturated the Minnesota community with reports of gang related deaths, shootings, and rapes. *Id.* at 677.

Given the community's strong negative reaction to gang involvement and the stigma surrounding those involved in gangs, for each eyewitness who testified to be asked preliminarily to confirm Fong Lee's gang involvement, clearly tainted all exculpatory testimony that may have followed. The pattern of trying the gang member instead of the man who was shot eight times revealed itself repeatedly from opening statement throughout the end of trial. The Respondents' closing argument then became the persuasive and logically foregone conclusion: Gang members carry guns. Fong Lee was a gang member. Therefore, Fong Lee carried a gun. This non-sequitur successfully misled the jury. *See Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (emphasizing closing arguments are especially influential because they "'sharpen and clarify issues for resolution by the trier of fact'") (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975)). Because of the highly prejudicial nature of gang related evidence, it is impossible to say jurors were not influenced when deciding whether Fong Lee possessed a gun. Accordingly, this Court should grant the petition for a writ of certiorari to provide guidance to the lower federal courts in determining the harmful effect of such egregious errors.

II. Charging the Jury with Evaluating the "Objective Reasonableness" of a Police Officer's Actions in Order to Determine the Viability of a Qualified Immunity Defense Hijacks Judicial Authority to Decide Questions of Law and Unduly Influences the Fact-Finder's Determinations.

Discord resonates among the circuit courts as to the proper role of the judge and jury in cases where qualified immunity is before the court. *See Sherwood v. Mulvihill*, 113 F.3d 396, 401 n.4 (3d Cir. 1997) ("[T]ension exists as to the proper role of the judge and jury where qualified immunity is asserted."). Even though the qualified immunity query is laden with technicality and requires legal scrutiny, a number of circuits charge the jury with determining the objective reasonableness of an officer's actions under § 1983. *See generally Curley v. Klem*, 298 F.3d 271, 278 n.3 (3d Cir. 2002) (noting the disparity of opinion existing among the circuit courts "as to whether a judge or jury should make the ultimate immunity determination"). Allocating qualified immunity to the jury, however, usurps the court's power to decide questions of law, creating unnecessary confusion in the jury box. This Court should grant this petition to resolve the disarray among the circuits and provide a uniform rule: that qualified immunity is a question of law properly reserved for the court and the presentation of such an issue to the jury unduly influences the fact-finder's conclusions.

A. The Circuits are Divided on the Appropriate Standard for Reviewing the District Court's Construction of Jury Instructions.

This Court has never articulated the appropriate standard of review for evaluating the district court's construction of a jury instruction on a special verdict form. Furthermore, the federal circuit courts vacillate between reviewing jury instructions *de novo* and for an abuse of discretion. *Compare Cook v. Rockwell Intern. Corp.*, Nos. 08-1224, 08-1226, 08-1239, 2010 WL 3449065, at *7 (10th Cir. Sept. 03, 2010) (reviewing *de novo* "whether, as a whole, the district court's jury instructions correctly stated the governing law and provided the jury with an ample understanding of the issues and applicable standards") *with Murphy v. FedEx Nat. LTL, Inc.*, Nos. 09-3473, 09-3518, 2010 WL 3341233, at *3 (8th Cir. Jun. 15, 2010) ("We review a district court's jury instructions for an abuse of discretion."). Granting certiorari would promote uniformity in the federal court system.

B. There is Confusion and Conflict between the Circuits Regarding the Submission of Questions Concerning Qualified Immunity to the Jury.

The circuits are split on whether qualified immunity falls within the jury's province. The First, Fourth, Seventh, and Eleventh Circuits have all indicated that qualified immunity is a question of law reserved for the court. *See Rodriguez v. Rivera-Gonzalez*, 438 F.3d

72, 83 (1st Cir. 2006) ("While preliminary factual questions regarding qualified immunity are sent to the jury, the legal question of the availability of qualified immunity is ultimately committed to the court's judgment.") (internal quotation marks omitted); *Willingham v. Crooke,* 412 F.3d 553, 560 (4th Cir. 2005) ("The issue having now come before us, we hold that the legal question of a defendant's entitlement to qualified immunity under a particular set of facts should be decided by the court, not by the jury."); *Riccardo v. Rausch,* 375 F.3d 521, 526 (7th Cir. 2004) ("Immunity, however, is a matter of law for the court, to be decided without deference to the jury's resolution—and preferably before the case goes to the jury."); *Johnson v. Breeden,* 280 F.3d 1308, 1318 (11th Cir. 2002) ("When the case goes to trial, the jury itself decides the issues of historical fact that are determinative of the qualified immunity defense, but the jury does not apply the law relating to qualified immunity to those historical facts it finds; that is the court's duty.").

The Fifth, Sixth, Ninth, and Tenth Circuits, on the other hand, have permitted the question to go to juries. *See Champion v. Outlook Nashville, Inc.,* 380 F.3d 893, 900 (6th Cir. 2004) ("The issue of whether qualified immunity is applicable to an official's actions is a question of law. However, where the legal question of qualified immunity turns upon which version of the facts one accepts, the jury, not the judge, must determine liability.") (internal citations and quotation marks omitted); *Maestas v. Lujan,* 351

F.3d 1001, 1010 (10th Cir. 2003) ("[T]he district court properly presented the reasonableness element of the qualified immunity analysis to the jury."); *McCoy v. Hernandez,* 203 F.3d 371, 376 (5th Cir. 2000) ("while qualified immunity ordinarily should be decided by the court long before trial, if the issue is not decided until trial the defense goes to the jury which must then determine the objective legal reasonableness of the officers' conduct."); *Ortega v. O'Connor,* 146 F.3d 1149, 1156 (9th Cir. 1998) (finding no error in "the district court's 'extra' reasonableness test, which . . . constituted an appropriate and proper instruction to the jury on the second prong of the defendants' qualified immunity defense—whether a reasonable state official could have believed his conduct was lawful—the prong as to which the existence of factual disputes requires the jury's determination.").

The Second and Eighth Circuits remain largely undecided; however, recent cases in these circuits strongly suggest an increasing tendency to reserve the question for the court. *Compare Stephenson v. Doe,* 332 F.3d 68, 81 (2d Cir. 2003) ("We believe that use of special interrogatories in this case resolves the difficulty of requiring the jury to decide 'what the facts were that the officer faced or perceived' and requiring the court to make the ultimate legal determination of whether qualified immunity attaches on those facts.") *with Oliveira v. Mayer,* 23 F.3d 642, 650 (2d Cir. 1994) ("The District Court should have let the jury (a) resolve these factual disputes and (b) based on its findings, decide whether it was objectively

reasonable for the defendants to believe that they were acting within the bounds of the law when they detained the plaintiffs."); *see also Kerman v. City of N.Y.*, 374 F.3d 93, 109 (2d Cir. 2004) (discussing roles of judge and jury in qualified immunity analysis, and citing both *Stephenson* and *Oliveira*). The Eighth Circuit itself has a tumultuous history with submitting qualified immunity questions to the jury. For instance, in *Littrell v. Franklin,* 388 F.3d 578, 585 (8th Cir. 2004)—a case heavily relied upon by the court and parties below—the court opined: "[s]pecial interrogatories related to the qualified immunity defense are not improper per se, but they must be carefully crafted so that the fact-finder's role is limited to determining whether the underlying facts are as the plaintiff has alleged or proved." (internal citations and quotation marks omitted). However, the *Littrell* decision makes no mention of *Turner v. Arkansas Ins. Dept.*, 297 F.3d 751, 754 (8th Cir. 2002), a case decided in the circuit two years earlier. In discussing an official's burden to come forward with "undisputed and material facts that demonstrate that his actions were reasonable under the circumstances[,]" the *Turner* court stated that "[i]f such facts are undisputed, then that is a question of law to be reviewed by a court; if not, then it is a question for a jury and summary judgment is improper.") *Turner*, 297 F.3d at 754.

The Eighth Circuit's decision in this case deepens an existing circuit split and falls on the wrong side of it, commandeering functions suitably answered by

the court—namely, determining the legal question of qualified immunity. The Eighth Circuit's decision further reflects the uncertainty in the federal courts regarding the ability and scope of the jury's power to decide such questions. A decision by this Court is thus necessary to promote uniformity among the federal courts and eradicate the current patchwork of applicable federal law.

1. Qualified immunity is a question of law that falls squarely within the power—and duty—of the judge.

Since this Court first recognized a qualified immunity defense for police officers in *Pierson v. Ray*, 386 U.S. 547 (1967), the doctrine of qualified immunity has undergone drastic change. *See Wood v. Strickland*, 420 U.S. 308, 310-11 (1975) (clarifying the subjective and objective elements of the qualified immunity test set forth in *Rhodes*); *Scheuer v. Rhodes*, 416 U.S. 232, 233-34 (1974) (articulating a two-part test for qualified immunity claims: an objective part requiring reasonable grounds for the official's belief in the legality of the challenged conduct, and a subjective part requiring good faith in fact). In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court substantially altered the two-part qualified immunity test, eschewing the subjective reasonableness portion and insisting that the objective portion be applied by the court. *Harlow*, 457 U.S. at 818. Under *Harlow*, an official is entitled to qualified immunity unless his conduct violates a "clearly established" constitutional

right. *Id.* at 818. By focusing wholly on the "clearly established" requirement and foreclosing any factual inquiry into the official's state of mind, *Harlow* transformed the question of qualified immunity from a mixed issue of fact and law into a pure question of law to be resolved by the court. *Id.* ("Rel[ying] on the objective reasonableness of an official's conduct, as measured by reference to clearly established law. . . ."). The Eighth Circuit's decision, however, together with the decisions from those circuits endorsing the jury's consideration of qualified immunity, flies in the face of *Harlow*.

2. Presenting the jury with a vague and unwarranted question regarding an officer's "objective reasonableness" necessarily bears upon the jury's determination.

Submitting the issue of qualified immunity to the jury paints a confusing picture for jurors and can seriously impair, as here, the interests of a plaintiff in a civil rights action.[4] "As difficult as it is for a judge to

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[4] The court of appeals noted Lee did not object to the verdict form on the basis that it was unfair or suggestive. Lee contends, however, that her running objection to the second question sufficiently preserved error for appellate review on these grounds. *See* Trial Trans. Vol. V, 904. In particular, Lee objected to any allocation of the qualified immunity question to the jury, contending that qualified immunity falls outside the ambit of the jury. *Id.* If jurors could consider questions of law outside of their proper scope, it logically follows that the fairness and

(Continued on following page)

ascertain whether a constitutional right is 'clearly established,' it is practically impossible for a jury to make such a determination. If a jury were forced to grapple with the question of law posed by the *Harlow* immunity inquiry, a trial within a trial would be required, 'with the jury hearing "evidence" of the state of law, trends in the law, and clarity of the law.'" Stephanie E. Balcerzak, Note, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation*, 95 YALE L. J. 126, 142 (1985) (quoting *Skevofilax v. Quigley*, 586 F. Supp. 532, 539 (D.N.J. 1984)). Juries, however, are hardly suited to analyze legal concepts and are ill-equipped to evaluate the relative strength of competing legal positions—especially given the technical complexity of qualified immunity questions. *See Stephenson*, 332 F.3d at 78-81.

To bypass the district court's error, the Eighth Circuit stated: "special interrogatories may be submitted to the jury to resolve any questions of historical fact so that 'the court may make the ultimate legal determination of whether officers' actions were objectively reasonable in light of clearly established law.'" *Andersen*, 2010 WL 3168626, at *7 (quoting

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integrity of the trial would be undermined. Therefore, Lee alerted the district court to the nature of such errors by protesting the submission of qualified immunity to the jury. *See United States v. Neal*, 578 F.3d 270, 272 (5th Cir. 2009) (holding an objection preserves error for appellate review when it is "sufficiently specific to alert the district court to the nature of the alleged error and provide an opportunity for correction").

Littrell, 388 F.3d at 586). In effect, the Eighth Circuit justified allocating the question to the jury to decide "predicate factual findings." *Id.* With the same breath, however, the Eighth Circuit admitted "[g]iven the jury instruction on excessive force, however, it appears that the second question reiterated the first question." *Id.* The court reasoned that "[h]ad the jury answered yes to the first question, it necessarily would have found that Andersen used force that was not reasonably necessary—that is greater force than a reasonable officer would have used under similar circumstances—to protect himself or others from death or great bodily harm." *Id.* Additionally, the Eighth Circuit held that the "finding of no excessive force mooted Andersen's defense of qualified immunity and rendered harmless any error in failing to define 'objectively reasonable.'" *Id.*

Despite the Eighth Circuit's apparent conclusion to the contrary, the excessive force and qualified immunity inquiries are distinct and the court wrongly conflates the Fourth Amendment question of excessive force with the qualified immunity prong of § 1983. *See Cox v. Hainey*, 391 F.3d 25, 31 (1st Cir. 2004) (recognizing qualified immunity "eschews a line that separates the constitutional from the unconstitutional and instead draws a line that separates unconstitutional but objectively reasonable acts from obviously unconstitutional acts"); *see also Iacobucci v. Boulter*, 193 F.3d 14, 23 (1st Cir. 1999) ("We must remember that the reasonableness standards underlying the [Fourth Amendment] and

qualified immunity inquiries are not coterminous."). To permit courts to supplant, and supplement, Fourth Amendment excessive force requirements with qualified immunity reasonableness cripples the canon of § 1983 actions and invites juror bias. Moreover, the detrimental effects of an improper jury interrogatory cannot be mitigated by artificially isolated portions of the special verdict form. *See Cook v. City of Bella Villa*, 582 F.3d 840, 856 (8th Cir. 2009) (stressing that courts must consider jury instructions *as a whole* to determine if an erroneous instruction affected a party's substantial rights). Accordingly, this Court should grant certiorari to clarify the allocation and impact of qualified immunity questions to the jury.

III. Richard Diercks was a Qualified Forensic Video Analyst and Should Have Been Permitted to Testify on the Issues of Video Perception and Imaging That Were Critical to Lee's Case.

Federal Rule of Evidence 702 relaxed the rules governing the admission of expert testimony, *Weisgram v. Marley Co.*, 160 F.3d 514, 523 (8th Cir. 1999), and provides courts with a permissive backdrop for construing the admissibility of expert evidence based upon scientific, technical, or other specialized knowledge. *Daubert v. Merrell Dow Pharmas.*, 509 U.S. 579, 589 (1993). Despite Rule 702's shift towards liberalizing the admissibility of expert testimony—and this Court's presumption in favor of admissibility—the district court improperly

excluded reliable, relevant evidence that would have assisted the jury in scrutinizing the content of the images presented at trial. *See id.*; *see also Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 142-43 (1999); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). In particular, the court of appeals below held that the district court's refusal to admit Diercks's opinion that Fong Lee did not have a gun in his hand because "the jury was entirely capable of analyzing the images and determining whether Fong Lee had anything in his hands." *Lee v. Andersen*, 2010 WL 3168628, at *4 (8th Cir. August 12, 2010). According to the lower court's reasoning on appeal, Diercks's testimony would "merely tell the jury what result to reach," and was therefore properly excluded. *Id.* (citing FED. R. EVID. 704 advisory committee's note). The circuit court's opinion, however, falls prey to a fundamental misconception of the grounds on which expert testimony is properly objectionable and further contravenes the dictates of Federal Rule of Evidence 704(a). FED. R. EVID. 704 advisory committee note; *see also United States v. Arenal*, 768 F.2d 263, 269 (8th Cir. 1985) (opining Rule 704 does not render expert testimony excludable merely "because it embraces an ultimate issue to be decided by the trier of fact").

To support its conclusion, the court below relied heavily on Diercks's testimony that "[t]he first and most simple [method of interpreting images] is just simple observation." Deposition of Richard Diercks at 15. However, this single proclamation cannot be construed in a vacuum and must be considered in

conjunction with Diercks's preceding and subsequent depositional statements. Contrary to the district court's conclusion, a thorough reading of Diercks's deposition shows he employed specialized skills and techniques in examining the images, and his testimony would have aided the jury in discerning aspects of the image that were uniquely palpable to the trained eye. *See Daubert*, 509 U.S. at 591 (affording an expert "wide latitude to offer opinions," based on the "assumption that the expert's opinion will have a reliable basis in knowledge and experience in his discipline"); *see also McKnight ex rel. Ludwig v. Johnson Controls, Inc.*, 36 F.3d 1396, 1408 (8th Cir. 1994) (holding the court should admit expert evidence where it will assist the jury).

A. Technological Advancements in Video Imaging Gave Credence to Diercks's Reliability and Militated in Favor of Admitting his Testimony.

In his deposition, Diercks confirmed that "human vision is really a question of how people are conditioned to what they see on the screen as opposed to what they see in reality." Deposition of Richard Diercks at 10. Diercks further explained that evolving technological standards differentiate "normal vision" from what experts in television and film production "have come to accept as close-up or more focused vision." *Id.* Most notably, Diercks expressly stated "[t]hese images are not the only thing that was relied on for my opinion," an opinion that stems from his

experience in critically examining "thousands [of images and photographs] with the specific purpose of determining what they contain [and whether they are] an accurate representation of an object, a person, a shape, a face, a color." *Id.* at 11, 17. Diercks's testimony would have facilitated the jury's acquisition of knowledge by pointing out that image construction requires more than "simple observation," and that such observation is merely the *first* step of the visual march in object identification—a task requiring the viewer to examine scale, size, shadow and angles, as well as appreciate the dynamics of image distortion. *See id.* at 15.

B. Diercks's Testimony Would Not Have Invaded the Province of the Jury, But Would Have Equipped the Jury with Information.

A time-honored tenet of our jurisprudential system provides "[t]he purpose of a trial is to investigate the facts so as to ascertain the truth . . . and a witness may be permitted to state a fact known to him because of his expert knowledge, even though his statement may involve a certain element of inference or may involve the ultimate fact to be determined by the jury." *Cooper v. Titanium Pigment Co.*, 47 F.2d 1039, 1043 (8th Cir. 1931); *see United States v. Amaral*, 488 F.2d 1148, 1152 (9th Cir. 1973). Indeed, our system of evidence rests on two axioms: "only facts having rational probative value are admissible and all [such facts] . . . are admissible unless some

specific policy forbids." *Amaral*, 488 F.2d at 1152. By precluding Diercks's testimony, the circuit court purports to give the jury the power to reach a result with one hand, while stripping the jury of this power with the other hand.

Depriving jurors of the benefit of an expert's knowledge of photographic images forces jurors to search for the truth without the full opportunity to evaluate the strength of the evidence; the jury should have the right to assess all of the available evidence in its quest for the truth. *See Ratliff v. Schiber Truck Co., Inc.*, 150 F.3d 949, 954 (8th Cir. 1998) (recognizing that a jury is free to accept or reject expert testimony). In short, this deprivation prevents jurors from having the best possible degree of understanding on the subject towards which the law of evidence strives. *See* FED. R. EVID. 702 advisory committee note (emphasizing Rule 702 does not require that the jury lack experience or knowledge of its own on which to evaluate the evidence, but rather insists that the expert possess a greater degree of understanding of the subject than the jury so that the proffered testimony enables the jury to evaluate the facts more intelligently). This Court should, therefore, grant the Petition for Writ of Certiorari to determine whether Diercks's testimony would have assisted the jury in assessing the image.

CONCLUSION

Granting this Petition for Writ of Certiorari would afford the Court the opportunity to clarify federal standards regarding the submission of gang affiliation evidence under Rules 403 and 404; to mend the circuit split on the submission of qualified immunity issues to the jury; and to refine the exclusion of expert testimony under *Daubert* and its progeny. For the reasons set forth above, the Petition for Writ of Certiorari should be **GRANTED**.

Respectfully submitted this 11th day of October, 2010.

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 09-2771

Youa Vang Lee, trustee for the heirs and next-of-kin of Fong Lee, Decedent, Appellant, v. Officer Jason Andersen; City of Minneapolis, Appellees.	* * * * * * * * * * *	Appeal from the United States District Court for the District of Minnesota.

Submitted: May 12, 2010
Filed: August 12, 2010

Before WOLLMAN, SMITH, and COLLOTON, Circuit Judges.

WOLLMAN, Circuit Judge.

Youa Vang Lee (Lee), as trustee for the heirs and next-of-kin of Fong Lee, filed suit against Minneapolis Police Officer Jason Andersen and the City of Minneapolis, among others, alleging a federal cause of action pursuant to 42 U.S.C. § 1983 as well as state

law tort claims arising from the death of Lee's son Fong Lee on July 22, 2006. Following a six-day trial, the jury returned a verdict finding that Andersen did not use excessive force against Fong Lee. The district court[1] entered judgment in favor of Andersen and the City of Minneapolis and denied Lee's subsequent motion for a new trial.

Lee appeals from the adverse judgment, arguing that the district court erred in excluding expert testimony that Fong Lee did not have a gun in his hand, in admitting evidence of Fong Lee's gang affiliation, and in formulating the special verdict form. Lee also appeals from the denial of her motion for a new trial, contending that the evidence cannot be reconciled with the verdict. We affirm.

I. Background

A. July 22, 2006

On Saturday, July 22, 2006, Fong Lee, age 19, and his friends, Too Xiong, Nhia Lor, Bobby Vang, and Phong Xiong, were riding bicycles near Cityview Elementary School in North Minneapolis. Cityview is located in a residential neighborhood and is monitored by surveillance cameras.

Officer Andersen and State Trooper Craig Benz were patrolling North Minneapolis in a marked police

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[1] The Honorable Paul A. Magnuson, United States District Judge for the District of Minnesota.

car that Andersen was driving. When they approached Cityview, they encountered the young men riding bicycles toward the school. Although the men were not doing anything suspicious when the squad car approached, Andersen decided to follow them. As the squad car caught up with the men, Fong Lee and Too Xiong, who were riding near the front of the group, jumped the curb and rode away from the squad car. Andersen activated the squad car's lights and drove it over the curb into a grassy area on school grounds in pursuit of the two men.

Fong Lee and Too Xiong appeared to come together on their bicycles. Andersen and Benz testified that they saw Too Xiong hand something to Fong Lee. Benz was unable to determine what the item was, but Andersen saw that it was a gun. Lor heard an officer say, "He's got a gun," and Andersen testified that he yelled, "He's got a gun."

According to Andersen and Benz, Fong Lee dropped his bicycle and started running. Other witnesses testified that the squad car hit Fong Lee, knocking him off his bicycle. The other young men left the scene, biking to Lor's house. They testified that they were frightened by the way Andersen had approached Fong Lee. They did not hear the officers issue any commands or warnings.

Andersen stopped the squad car, and both he and Benz exited the car with their service weapons drawn. As Benz exited, he yelled "police" and "gun" because he saw the handle of the gun. Andersen and

Benz chased Fong Lee on foot, keeping their service weapons drawn and with Andersen in the lead. Benz slowed down and considered retrieving the squad car, but decided to continue to pursue Fong Lee on foot so that he would be able to provide backup to Andersen. Andersen reported on his radio that he was chasing an armed person. Andersen testified that he commanded Fong Lee to drop the gun, repeatedly yelling, "Police. Drop the gun." Several neighbors testified that they did not hear Andersen's commands, but one neighbor heard two or three commands to put the gun down.

Andersen chased Fong Lee around a corner of the school, between the school and a retaining wall. As they were rounding the corner, Fong Lee turned back towards Andersen. Andersen testified that he could see a gun in Fong Lee's right hand and felt threatened as Fong Lee pivoted. Andersen fired one shot, which missed, and Fong Lee continued to run. After rounding the corner, Fong Lee turned back a second time. According to Andersen, Fong Lee turned his upper body to the right one-hundred-eighty degrees, with the gun still in his hand. Although Fong Lee did not point the gun at him, Andersen testified that he believed his life was in danger and Fong Lee was going to shoot him. Andersen fired three more shots, all of which struck Fong Lee, and saw one bullet hit Lee in the lower right abdomen. Upon being struck by the bullets, Fong Lee fell to the ground and Andersen continued to yell, "Drop your gun." Andersen perceived that Fong Lee was trying to get up from the

seated position, whereupon Andersen fired five more shots. As Fong Lee fell backwards, Andersen saw a gun fly out of his hands. Andersen adopted a defensive stance and ceased firing. Fong Lee was hit by a total of eight bullets and died at the scene from his wounds.

Police backup arrived shortly thereafter. Officer Bruce Johnson, the first to arrive, saw Andersen standing with his gun pointed at Fong Lee. Neither Andersen nor Benz had approached Fong Lee's body. Numerous law enforcement officials arrived within seconds of Johnson. Johnson took steps to segregate Andersen from the responding officers, as department policy requires. Benz was sequestered separately. Johnson approached the body and observed Fong Lee on his back with a gun a few feet away from his left hand. The gun was a Russian-made Baikal .380 caliber semi-automatic pistol.

Three school surveillance cameras captured parts of the incident. Video from camera 1 shows the bicyclists approach the school, the squad car approach the bicyclists, and Fong Lee drop his bicycle. Video from camera 2 shows part of the foot chase, with Fong Lee in the lead followed by Andersen and Benz. Video from camera 3 captured the end of the chase, including images of Andersen with his gun drawn, Fong Lee's body, and the squad cars arriving approximately two minutes after the chase ended.

B. Procedural Background

Lee filed suit in February 2007.[2] Lee later amended the complaint to claim punitive damages against Andersen. In the answer, Andersen pleaded the affirmative defenses of qualified and official immunity. The City moved for partial summary judgment, seeking dismissal of the *Monell* § 1983 claims[3] and the state claims for negligent hiring, supervision, control, and retention. The district court granted the City's motion. The claims remaining for trial were the § 1983 claim and the state law torts of assault, battery, and wrongful death against Andersen, and vicarious liability against the City for the alleged torts.

In their pre-trial filings, Lee moved to exclude any evidence of Fong Lee's gang affiliation, and Andersen and the City moved to exclude expert testimony regarding whether Fong Lee had a gun in his hand. As set forth more fully below, Lee's motion was denied and the defendants' motion was granted.

Trial commenced in May 2009. Lee's theory of the case was that Fong Lee did not have a gun; that he

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[2] The initial complaint named Benz and the State of Minnesota as defendants. Lee later stipulated to the dismissal with prejudice of the case against Benz and Minnesota.

[3] *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978), held that a plaintiff seeking to impose § 1983 liability on a municipality must show an official policy or a widespread custom or practice of unconstitutional conduct that caused the deprivation of the plaintiff's constitutional right.

ran from the officers out of fear after they had knocked him off his bicycle; that Andersen had no reason to use force against Fong Lee; that the gun found near his body was planted by one or more law enforcement officers; and that a "young, aggressive cop committed a horrible wrongful killing." Lee argued that the images captured by the surveillance cameras constituted conclusive evidence that Fong Lee was not carrying a gun. Andersen and the City argued that Andersen shot Fong Lee after reasonably perceiving a threat to his life. They conceded that the images were unclear, but maintained that the physical evidence was consistent with Andersen's and Benz's testimony.

C. The Gun Found Near Fong Lee's Body

At trial, Lee attempted to establish that the gun found near Fong Lee's body may have been in police custody prior to July 22, 2006, and thus could have been placed at the scene by Andersen, by Johnson, or by some other law enforcement officer. Without detailing the extensive testimony regarding this issue, suffice it to say that the weapon was identified by its owner as having been stolen from his home in mid-February 2004 and that it was never in custody of the Minneapolis Police Department prior to its being recovered at the scene of the shooting.

Lee also made an issue of the fact that there was no trace evidence – that is, no blood, fiber, fingerprints, or smudges – found on the gun. In response,

the police department's forensic scientist testified that it is not unusual to examine a gun without finding trace evidence and that about twelve percent of guns have an identifiable latent print.

II. Analysis

A. Exclusion of Expert Conclusion

Lee identified Richard Dierks as an expert under Federal Rule of Civil Procedure 26(a)(2). Dierks used digital video recording and processing technology to increase the contrast of the video images captured by the surveillance camera. He clarified seven individual frames captured by camera 3, covering a period of 1.3 seconds near the end of the foot pursuit. Dierks's expert report opined that "Fong Lee did not have a firearm in his right hand during the moments before the shooting incident on July 22, 2006. Fong Lee did not have any object in his right hand during the moments before the shooting incident." When asked what methods and principles he used to interpret images, Dierks replied that the first method is "simple observation."

Andersen and the City moved *in limine* to exclude Dierks from testifying as to whether the seven images showed that Fong Lee had an object in his hand. The district court granted the motion because "the jury does not need assistance in determining whether they can see a gun or any other object in the decedent's hand." D. Ct. Order of May 13, 2009, at 10. The district court remarked that Dierks's conclusion

was "based on his observation of the video – he did not employ any technique or utilize any specialized skill that is unavailable to the jury." *Id.* Dierks was permitted to testify regarding how he modified the video and how those modifications might assist the jury.

Dierks's trial testimony allowed the jury to better understand how the school surveillance camera worked and the process he used to clarify the images. He explained that camera 3 captured five frames per second, whereas televisions broadcast thirty frames per second. The camera rotated 360 degrees in a time period of 118 seconds, focusing on certain doors and windows before panning out for a wider view of the surrounding area. He testified that the footage was somewhat overexposed, resulting in softer lines and edges. To clarify the images, he increased the contrast. The clarified images were submitted to the jury to assist it in understanding the crucial moments leading up to Fong Lee's death.

Lee argues that the district court erred in excluding Dierks's expert testimony that Fong Lee did not have a gun or any other object in his hand. We review the district court's decision to exclude expert testimony for abuse of discretion. *McKnight ex rel. Ludwig v. Johnson Controls, Inc.*, 36 F.3d 1396, 1408 (8th Cir. 1994).

Federal Rule of Evidence 702 permits a qualified expert to give opinion testimony if the expert's specialized knowledge would allow the jury to better

understand the evidence or decide a fact in issue. *United States v. Arenal,* 768 F.2d 263, 269 (8th Cir. 1985). "The touchstone for the admissibility of expert testimony is whether it will assist or be helpful to the trier of fact." *McKnight,* 36 F.3d at 1408. Rule 704(a) provides that expert evidence is not inadmissible because it embraces an ultimate issue to be decided by the jury. If the subject matter is within the jury's knowledge or experience, however, the expert testimony remains subject to exclusion "because the testimony does not then meet the helpfulness criterion of Rule 702." *Arenal,* 768 F.2d at 269. Opinions that "merely tell the jury what result to reach" are not admissible. Fed. R. Evid. 704 advisory committee's note.

Dierks's opinion that Fong Lee did not have a gun in his hand was properly excluded under Rule 702. The opinion would not have assisted the jury but rather would have told it what result to reach. Dierks explained in his deposition that the first method he uses to interpret images is "simple observation." He compared the images and considered the position of Fong Lee's hand, the size of the objects, and the shadows. When asked what specialized knowledge he had to assist the jury in deciding what the clarified images show, Dierks responded, "I believe that a reasonable person looking at the clarified photograph and looking at Fong Lee's hand would conclude that his hand does not have a firearm in it." Although Dierks testified that his experience and training allow him to look at an image more critically than a

lay person, the jury was entirely capable of analyzing the images and determining whether Fong Lee had anything in his hands.

B. Gang Affiliation Evidence

Before trial, Lee moved to exclude any evidence of Fong Lee's gang membership on the basis that the evidence was irrelevant and unfairly prejudicial. It was undisputed that Andersen and Benz did not know Fong Lee or whether he was affiliated with a gang when they encountered him on July 22, 2006. Andersen and the City opposed the motion, arguing that evidence of Fong Lee's gang affiliation was relevant (1) to prove damages in the wrongful death action because criminal gang members likely have a shorter life span and contribute less to their family; (2) to impeach his family members if they denied Fong Lee's gang affiliation; and (3) to show that he had a gun on July 22, 2006, that he was spending time with friends who had guns, and that he fled from the officers because he had a gun. The district court rejected the first two bases for admission, but concluded that Fong Lee's alleged gang membership was relevant to whether he or his friends had access to a gun and to show Fong Lee's motive for running from the officers.

Vang, Too Xiong, and Lor testified that Fong Lee was a member of OMB, which Vang explained was an acronym for "Only My Brother" or "Oro[ville] Mono Boy." Lor testified that he had belonged to OMB, but

did not engage in any violent behavior as a member. Lor stated that he was no longer associated with OMB and that he was "trying to get his life straight." Phong Xiong did not know Fong Lee to be a gang member.

In closing argument, defense counsel argued that the jury should consider the following when it considered why Fong Lee ran away from the officers:

> We do know that he was a gang member. We heard that from several of his acquaintances. Nhia Lor admitted that Fong Lee was a gang member, a member of OMB. And despite Mr. Lor's attempt to recast OMB as some sort of civic organization or glee club, or something, it's clear that both of those two individuals belonged to a gang. Nhia Lor admitted, "After this incident I got out of the gang because I wanted to turn my life around." It wasn't a civic organization, ladies and gentlemen. These are gang members.

We review evidentiary rulings for abuse of discretion and reverse only when an improper evidentiary ruling affects the substantial rights of a party or the error had more than a slight influence on the verdict. *United States v. Street,* 548 F.3d 618, 633 (8th Cir. 2008). We have held that evidence of gang membership is admissible if relevant to a disputed issue. *United States v. Lemon,* 239 F.3d 968, 971 (8th Cir. 2001). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or

less probable than it would be without the evidence." Fed. R. Evid. 401. Relevant evidence is admissible but may be excluded under Rule 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."

Evidence of Fong Lee's gang affiliation was used to rebut the plaintiff's assertion that Fong Lee fled from Andersen because he was frightened by Andersen's aggressive approach. Other than the argument recounted above, the defendants offered no evidence regarding the nature of OMB or the activities its members engaged in. The inferences that the defendants tacitly asked the jury to draw were that gangs are more likely to engage in illegal activities, that engaging in an illegal activity gives motive to flee from police officers, and that Fong Lee's gang affiliation made it more likely that he was engaged in an illegal activity that would cause him to flee. The logic supporting its relevance is attenuated, and evidence of Fong Lee's gang membership was, at best, marginally probative of his motive in fleeing from the officers.

Similarly, the gang affiliation evidence had slight probative value on whether Fong Lee was carrying a gun as he fled the officers. But the assumption that

all gang members carry guns is the same assumption that gives rise to the danger of unfair prejudice.[4]

Given its low probative value and the danger of unfair prejudice, the gang affiliation evidence should have been excluded. Any error in admitting it, however, was harmless. The testimony was limited to whether Fong Lee was a member of a gang. The jury knew only that the gang was called OMB, that Lor had not engaged in violent activities while associated with the gang, and that he left the group when he decided to "get his life straight." When viewed in light of the evidence presented over the course of the six-day trial, we conclude that the gang affiliation testimony and defense counsel's limited use thereof during closing argument did not affect Lee's substantial rights or have more than a slight influence on the verdict.

C. Verdict Form

The district court's instructions explained that the jury was required to return a verdict in Lee's favor if it found that the elements of excessive force had been proven by a preponderance of the evidence.

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[4] At oral argument, counsel for Andersen and the City stated that he had provided the district court with a study to provide foundation. It is unclear whether this study was cited to the district court before it ruled on the motion in limine. Neither the defendants' memorandum in opposition to Lee's motion to exclude evidence nor the district court's order cites any authority.

The instructions listed the elements as follows: (1) Andersen shot Fong Lee in the act of stopping him; (2) the use of such force was excessive because it was not reasonably necessary to protect Andersen or others from apparent death or great bodily harm; (3) as a direct result, Fong Lee was damaged; and (4) Andersen was acting under color of state law. The instructions went on to list factors to consider in determining whether such force was "not reasonably necessary," including "whether a reasonable officer on the scene, without the benefit of 20/20 hindsight, would have used such force under similar circumstances."

The first question on the special verdict form asked the jury whether it found in favor of the plaintiff on the claim of excessive force. The form instructed the jury to proceed to the second question if its answer was yes. The second question asked: Was Andersen "objectively reasonable in his belief that his use of deadly force was necessary to protect himself or another from apparent death or great bodily harm?"

Lee objected to the second question, arguing that the issue of qualified immunity is a question of law for the court to decide. The district court overruled the objection, stating that the question was tailored to allow the jury to make predicate factual findings necessary for the court's qualified immunity ruling. The jury found that Andersen did not use excessive force against Fong Lee and thus did not reach the second question. Lee contends that the district court

committed reversible error in submitting the second question to the jury and in failing to define "objectively reasonable."

We review the district court's construction of the special verdict form for abuse of discretion, reversing only if an error affected a party's substantial rights. *Cook v. City of Bella Villa,* 582 F.3d 840, 856 (8th Cir. 2009). Our review is limited to whether the instructions and the verdict form, taken as a whole and viewed in light of the evidence and applicable law, fairly and adequately submitted the issues to the jury. *Id.*

Lee misstates the law when she argues that *Littrell v. Franklin,* 388 F.3d 578 (8th Cir. 2004), "held it would be reversible error to submit a question regarding qualified immunity to the jury." In *Littrell,* we held that the district court erred in submitting to the jury the question whether the officer reasonably believed that his actions were objectively reasonable in light of clearly established law. *Id.* at 584. In reaching our holding, we determined that carefully drafted special interrogatories may be submitted to the jury to resolve any questions of historical fact so that "the court may make the ultimate legal determination of whether officers' actions were objectively reasonable in light of clearly established law." *Id.* at 586.

The district court's stated purpose in submitting the second question to the jury was to allow the jury to make predicate factual findings, a practice that is

permitted under *Littrell*. Given the jury instruction on excessive force, however, it appears that the second question reiterated the first question. Had the jury answered yes to the first question, it necessarily would have found that Andersen used force that was not reasonably necessary – that is, greater force than a reasonable officer would have used under similar circumstances – to protect himself or others from death or great bodily harm. But the jury found that Andersen did not use excessive force and thus never reached the second question. The finding of no excessive force mooted Andersen's affirmative defense of qualified immunity and rendered harmless any error in failing to define "objectively reasonable."

Lee contends that the two questions, taken together, directed the jury to find the shooting lawful. Lee did not object to the verdict form on the basis that it was unfair or suggestive, and we fail to see how the verdict form required or suggested that the jury return a verdict for the defendants. The form's language was plain, allowing the jury to return a verdict for either the plaintiff or the defendants and to determine the plaintiff's damages, if necessary. The jury instructions and special verdict form were not prejudicial and, taken as a whole, adequately submitted the issues to the jury.

D. Denial of Motion for New Trial

Lee contends that the district court erred in denying her motion for a new trial. She argues that

the evidence does not support the conclusion that Andersen had probable cause to believe that Fong Lee posed a threat of serious physical harm to himself or others.

We review the denial of a motion for a new trial for an abuse of discretion. *Structural Polymer Group, Ltd. v. Zoltek Corp.*, 543 F.3d 987, 991 (8th Cir. 2008). A new trial motion premised on a dispute about the strength of the supporting proof should be granted only if the verdict is against the great weight of the evidence and allowing it to stand would result in a miscarriage of justice. *Id.*

A reasonable jury could find that Fong Lee was carrying a gun. It is undisputed that a Baikal .380 caliber semi-automatic pistol was found near Fong Lee's body. Lee presented the theory that the gun was planted at the scene, supporting it with the video evidence from the surveillance cameras; the testimony from Fong Lee's fellow bikers that he did not have a gun on July 22, 2006; the attempted showing that the gun found near Fong Lee's body may have been in police custody prior to the shooting; and the finding that the gun did not have blood, fiber, fingerprints, or smudges on it. It was for the jury to assess the credibility and weight of the evidence and determine the inferences to be drawn therefrom, and a finding that Fong Lee was carrying a gun on July 22, 2006, would not be against the great weight of the evidence.

The evidence supported the jury's verdict that Andersen did not use excessive force against Fong

Lee. The jury was instructed that the force was excessive if "it was not reasonably necessary to protect Andersen or others from apparent death or great bodily harm." Andersen testified that Fong Lee made threatening movements in the moments leading up to the shooting. He testified that Lee turned his body, with gun still in hand, towards Andersen in such a way that Andersen believed his life was in danger and Fong Lee was going to shoot him. The video from the surveillance camera corroborated Andersen's testimony that Fong Lee turned towards Andersen near the end of the foot pursuit. The defendants thus presented sufficient evidence to allow a jury to find that lethal force was reasonably necessary to protect Andersen or others from apparent death or great bodily harm.

Finally, our review of the record satisfies us that there is no support for Lee's assertion that the conduct and demeanor of the district court prevented her from introducing relevant evidence or having a fair trial.

III. Conclusion

The judgment is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 09-2771

Youa Vang Lee, trustee for the heirs
and next-of-kin of Fong Lee, Decedent,

Plaintiff-Appellant

v.

Officer Jason Andersen; City of Minneapolis,

Defendants-Appellees

Appeal from U.S. District Court
for the District of Minnesota – Minneapolis
(0:07-cv-01205-PAM)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

August 12, 2010

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 09-2771

Youa Vang Lee, trustee for the heirs and
next-of-kin of Fong Lee, Decedent

Appellant

v.

Officer Jason Andersen and City of Minneapolis

Appellees

Appeal from U.S. District Court
for the District of Minnesota – Minneapolis
(0:07-cv-01205-PAM)

ORDER

Appellant's motion to recall the mandate has been considered by the Court and is denied.

The motion of the appellant for an extension of time, until September 15, 2010, to file a petition for rehearing is granted.

September 13, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 09-2771

Youa Vang Lee, trustee for the heirs and next-of-kin of Fong Lee, Decedent

Appellant

v.

Officer Jason Andersen and City of Minneapolis

Appellees

Appeal from U.S. District Court
for the District of Minnesota – Minneapolis
(0:07-cv-01205-PAM)

MANDATE

In accordance with the opinion and judgment of 08/12/2010, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter.

September 02, 2010

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Youa Vang Lee, trustee for the Heirs and next-of-kin of Fong Lee, Decedent, Plaintiff, v. Officer Jason Andersen and The City of Minneapolis, Defendants.	Civil No. 07-1205 (PAM/JSM) **MEMORANDUM AND ORDER** (Filed Jun. 26, 2009)

This matter is before the Court on Plaintiff's Motion for Amendment (JNOV) and/or New Trial. For the reasons the follow, the Motion is denied.

BACKGROUND

Plaintiff Youa Vang Lee is the mother of Fong Lee, whom Minneapolis Police Officer Jason Andersen shot and killed in July 2006. Plaintiff sued Officer Andersen and the City of Minneapolis, alleging that Officer Andersen wrongfully killed Fong Lee and that the City of Minneapolis attempted to cover up Andersen's guilt. Defendants moved for partial summary judgment. While that Motion was under advisement, Plaintiff's counsel[1] twice submitted additional factual

[1] Plaintiff was represented in this matter by attorneys Michael Padden and Richard Hechter.

information without seeking and receiving permission from the Court to do so. The Court granted summary judgment to Officer Andersen on Plaintiff's intentional infliction of emotional distress claim, and to the City on Plaintiff's negligence and § 1983 claim. The Court erroneously granted summary judgment to the City on Plaintiff's separate state-law vicarious liability claim. On Plaintiff's request, the Court remedied its error and clarified that the City could still be vicariously liable under state law for Officer Andersen's actions.

Prior to trial, both parties filed a number of motions in limine. At issue here are three of the Court's rulings on those Motions.

First, the Court denied in part and granted in part Plaintiff's request to prohibit Defendants from introducing evidence that Fong Lee was a member of a gang. The Court ruled that Fong Lee's gang membership was "relevant to the issue of whether he had a gun the day he was shot" but "irrelevant to the question of damages for wrongful death." The Court expressly noted that in crafting its decision on this particular issue it had "balanced the risk of unfair prejudice with the relevance of decedent's gang membership."

Second, the Court granted Defendants' motion to exclude Plaintiff's expert Richard Diercks's testimony regarding whether Fong Lee had a gun in his hand in a series of images taken from a security camera. The Court so held because the jury was equally capable of

observing the videotape and determining for themselves whether Fong Lee was holding a gun. Mr. Diercks was permitted to testify as an expert regarding the way that he manipulated the video to clarify the still images.

Finally, the Court granted Defendants' motion to exclude a statement by Sergeant Jesse Garcia of the Minneapolis Police Department that he did not see a gun in Fong Lee's hand in the security video. The Court held that the statement was inadmissible because it was irrelevant to the City's vicarious liability, Garcia could not make an admission on behalf of Officer Andersen, and allowing the statement into evidence would have confused the jury and unfairly prejudiced Officer Andersen.

Prior to trial, Plaintiff's counsel submitted an exhibit list and witness list that did not comport with Local Rule 39.1(b)(1)(C). Plaintiff's counsel did not remedy the non-conforming witness list until the Court issued a written order requiring the same. Plaintiff's counsel second attempt at a proper exhibit list still failed to comply with Local Rule 39.1. It was not until the Court gave Plaintiff's counsel courtesy copies of the Local Rules that Plaintiff's counsel finally submitted a proper exhibit list. Plaintiff's counsel's failure to comply with this particular Local Rule caused confusion in the courtroom on more than one occasion and wasted the Court's and the jury's time. Plaintiff's counsel also initially failed to premark their exhibits, further wasting the Court's time.

A jury was empaneled on May 18, 2009, and the trial commenced the following day. Over the course of the following week and a half, Plaintiff's counsel put on a display the likes of which this Court has never seen before. The Court will not undertake a comprehensive review of each blunder, misstep, and mistake.[2] However, in light of Plaintiff's current Motion, a review of some of the highlights is necessary.

In opening statements, Plaintiff's counsel promised the jury that the evidence would show a number of things that simply were not true. Some of those promises included:

- that Officer Andersen bumped into Fong Lee's bike with the police car, even though security video footage showed the police car was never within a car's length of Fong Lee's bicycle.
- that the security camera footage showing a portion of the chase conclusively showed Fong Lee did not have a gun, even though the video segment that Plaintiff's counsel focused on was unclear at best. Another segment of the video that Plaintiff's counsel apparently had not looked at did show that

[2] The Court did not, and does not, expect perfection from counsel during a trial or any other matter. However, the Court does believe it fair to expect that attorneys who are admitted to practice in the District of Minnesota should be able to piece together a lawsuit that at least generally adheres to the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and the Local Rules.

Fong Lee had a gun. The jury was apparently not as convinced as Plaintiff's counsel by the video footage.

- that the Minneapolis Police Department had the gun that was found near Fong Lee's body in its possession since 2004, even though the evidence overwhelmingly showed that the City never had the gun in its possession until after the Fong Lee shooting.

An egregious error committed by Plaintiff's counsel during the course of the trial was displaying a graphic image of Fong Lee's body to the jury before the image was admitted into evidence. When the picture was displayed, Plaintiff understandably cried out and audibly sobbed until the Court dismissed the jury for the day. Counsel for Defendants had agreed that the image could be admitted into evidence. However, Plaintiff's counsel failed to move for its admission. Plaintiff's counsel also failed to give any kind of warning to the Court, the jury, or apparently, his client, that the image was about to be displayed. The Court told Plaintiff's counsel to remove the photograph because it had not yet been admitted into evidence. The Court then permitted Plaintiff's counsel to finish examining the witness that was then on the stand, after which the Court dismissed the jury for the day. The Court reprimanded Plaintiff's counsel out of the presence of the jury.

The following morning, the Court gave Plaintiff's counsel copies of the Local Rules and gave Plaintiff's counsel a stern warning that if a similar error

occurred again the Court would declare a mistrial, remove Plaintiff's counsel from the case, and require counsel to pay for Plaintiff's and Defendants' costs and fees. This was done outside of the presence of the jury.

Although the court requested that the parties agree to a verdict form, they failed to do so. Therefore, the Court created its own form. Question One asked the jury whether Andersen used excessive force. The jurors were instructed not to answer any of the remaining questions if their answer to Question One was that Andersen was justified in using force against Fong Lee. The jurors answered Question One in favor of Officer Andersen and therefore did not answer any remaining questions.

Plaintiff's counsel objected to Question Two on the Special Verdict Form. Question Two said: "Was Defendant Officer Jason Andersen objectively reasonable in his belief that his use of deadly force was necessary to protect himself or another from apparent death or great bodily harm?" Plaintiff's counsel did not object that the jury instructions did not include a definition of "objectively reasonable."

Plaintiff now moves for an amended verdict or a new trial under Federal Rule of Civil Procedure 59 and 60.

DISCUSSION

1. Standard of Review – New Trial or Relief from Judgment

"A court may grant a new trial on the basis that the verdict is against the weight of evidence, if the first trial results in a miscarriage of justice." *Shaffer v. Wilkes,* 65 F.3d 115, 117 (8th Cir. 1995) (citing *White v. Pence,* 961 F.2d 776, 780 (8th Cir.1992)). A trial judge has broad discretion in ruling on motions for new trial. *Id.*

A motion for relief from judgment can only be granted in specific, enumerated circumstances. *See* Fed. R. Civ. P. 60(b). Plaintiff's arguments all fall under the final circumstance – "any other reason that justifies relief." *Id.* 60(b)(6). The Court has broad discretion to grant a Rule 60(b) motion, but may only do so in "exceptional circumstances." *Hepper v. Adams County,* 133 F.3d 1094, 1096 (8th Cir.1998).

2. Gang Membership

Plaintiff argues that the Court's ruling allowing Defendants to introduce evidence of Fong Lee's gang membership deprived Plaintiff of a fair trial. The jury could reasonably infer that Fong Lee ran from Officer Andersen and Trooper Benz because he was a gang member. The jury could also reasonably infer that it was more likely that Fong Lee had a gun the day he was shot because he was a member of a gang. Plaintiff's theory that Fong Lee ran away because he was scared after Officer Andersen ran into him with the

police car simply does not accord with the evidence that the police car did not strike Fong Lee. At least one of Plaintiff's witnesses that had previously testified that he saw the police car hit Fong Lee admitted that he was in error after seeing the security camera footage showing that the car did not strike him. The Court considered the unfair prejudice that could have resulted from introducing evidence of Fong Lee's gang membership. The Court allowed the evidence to be introduced regarding whether Fong Lee had a gun, but did not allow it to be introduced regarding damages. In her memorandum, Plaintiff did not cite a single case supporting her position that evidence of gang membership is unfairly prejudicial. A study cited by Defendants confirms that gang membership is relevant to Fong Lee's access and possession of a gun. *See* Beth Bjerregaard & Alan J. Lizotte, *Gun Ownership and Gang Membership,* 86 J. Crim. L. & Criminology 37 (1995).

Plaintiff argues that Fong Lee's gang membership was not relevant because neither Officer Andersen nor Trooper Benz knew that he was a member of gang at the time they chased him. The evidence was not admitted to explain why the officers chased Fong Lee, but rather to show Lee's motivation in running from police and as evidence that made it more likely that he had a gun when he ran.

Finally, Plaintiff argues that a "confidential source" informed Plaintiff's counsel that the jury feared retribution is evidence that Plaintiff was denied a fair trial. In a remarkable leap of logic and

flying in the face of the rest of the evidence presented at trial, Plaintiff's counsel concludes that "the gang information nullified Fong's life and its value in the eyes of the jury. The jury did not care about the evidence and ignored the same. The jury was focused on and apparently made their decision upon what should have been inadmissible and highly inflammatory bad character and reputation evidence." (Pl.'s Mem. at 3.) Plaintiff's counsel apparently mistakes its motion for new trial for a press conference. Whatever weight a confidential source may hold outside of the courthouse, the Court cannot rely on "confidential" sources in rendering a legal decision. Further, even if the jury did fear retribution, it would cut against Plaintiff's argument – the jury apparently felt convinced enough that Officer Andersen was justified in using force against Fong Lee that they rendered a verdict against Plaintiff even though they feared retribution. Plaintiff's motion for a new trial on this issue is denied.

3. Expert Testimony

Plaintiff also objects to the Court's order prohibiting Plaintiff's expert, Richard Diercks, from telling the jury his opinion about whether the security camera footage showed that Fong Lee had a gun in his hand. Plaintiff's counsel correctly argues that an expert opinion cannot be excluded simply because "it embraces an ultimate issue to be decided by the trier of fact." Fed. R. Evid. 704(a). The Court, however, did not exclude Mr. Diercks's final opinion because it

embraced an ultimate issue but because it was not helpful to the jury. Mr. Diercks employed a variety of expert techniques to clarify the video images, and the Court permitted him to explain those steps to the jury. He did not, however, employ any specialized knowledge or skill in determining whether he saw a gun in Fong Lee's hand in the video. He simply looked and explained what he saw. The jury was equally capable of doing the same, and therefore Mr. Diercks's opinion was inadmissible. *See Williams v. Pro-Tec, Inc.*, 908 F.2d 345, 348-49 (8th Cir. 1990) ("Expert testimony may be properly excluded if the jury, being apprised of all the relevant facts, is equally able to draw the asserted conclusion."). Plaintiff's claim that Mr. Diercks's opinion would have changed the outcome of the case is wholly without merit. Plaintiff's counsel had ample opportunity to show the video or still images and discuss what it did or did not show in Fong Lee's hands. Their failure to do so does not make the Court's earlier decision erroneous.

4. Special Verdict Form

Plaintiff argues that Question Two on the Special Verdict Form was improperly submitted to the jury. Plaintiff correctly cites *Littrell v. Franklin*, 388 F.3d 78 (8th Cir. 2004), in support of its argument that submitting the legal question of qualified immunity to the jury is reversible error. Plaintiff's counsel, however, either failed to read or willfully ignored the

paragraph immediately following the cited[3] paragraph of *Littrell*. The *Littrell* court specifically held that a trial court may submit questions of predicate fact to the jury when the question of qualified immunity depends on the resolution of those factual questions. *Id.* at 585. Question Two was a predicate factual question that would have helped the Court rule on Officer Andersen's claim of qualified immunity. It was therefore proper to submit it to the jury.

Although Plaintiff's counsel "has no doubt that the question submitted to the jury [Question Two] improperly influenced them in reaching their ultimate conclusion," the Court sees no evidence that the question influenced the jury at all. The jury never reached Question Two. They answered Question One in favor of Officer Andersen, and as directed by the Special Verdict Form, the jury foreperson signed and dated the form without answering any of the other remaining questions. Even if Question Two was improper, it was harmless.

Plaintiff's counsel argues that the Court set up the Special Verdict Form with "two back-to-back questions [Question One and Question Two] suggesting or impliedly directing the jury to find the shooting lawful." (Pl.'s Mem. at 6.) The same reasoning would mean that the questions concerning Plaintiff's damages

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[3] Plaintiff's counsel apparently did not feel it necessary to include pin citations to any of the cases it referenced in its memorandum, yet again wasting the Court's time.

impliedly directed the jury to find for Plaintiff. In any event, the fact that Plaintiff's counsel did not object to Question One belies this argument. Plaintiff's counsel also did not object to the lack of a definition of "objectively reasonable" in the jury instructions, nor did Plaintiff's counsel suggest that such an instruction be included. Plaintiff's second objection to the Special Verdict Form was therefore waived.

5. Verdict Based on the Evidence

Plaintiff moved for judgment notwithstanding the verdict, based in part on insufficiency of the evidence to support the verdict for Defendants. Plaintiff waived her right to move for a judgment notwithstanding the verdict by failing to bring a Rule 50 motion for judgment as a matter of law. *See Pulla v. Amoco Oil Co.*, 72 F.3d 648, 655 (8th Cir. 1995) ("Under Rule 50(b), a litigant who fails to move for judgment as a matter of law at the close of the evidence cannot later argue . . . that the verdict was supported by insufficient evidence." (footnote omitted)). Even if Plaintiff had not waived her right to bring a motion for judgment notwithstanding the verdict, Plaintiff's motion based on insufficiency of evidence must be denied. *See infra* Section 6.

Plaintiff's argument that the verdict cannot be reconciled with the evidence ignores the vast majority of the evidence presented at trial. Below is a summary of the evidence that Plaintiff's counsel puts

forward and the evidence on the same issues that Plaintiff's counsel ignores.

- *For Plaintiff*: Non-party witnesses testified that Fong Lee did not have a gun. *Against Plaintiff*: The same non-party witnesses also testified that they saw the police car run into Fong Lee and knock him off his bike, even though the security camera footage clearly showed that did not occur. Both Officer Andersen and Trooper Benz testified that they saw a gun in Fong Lee's hands. During the foot chase Officer Andersen told police dispatch that he was chasing someone who had a gun.

- *For Plaintiff*: Both police officers testified that Fong Lee never pointed the gun directly at them. *Against Plaintiff*: Both officers testified that they felt threatened by Fong Lee. Officer Andersen testified that he did not shoot until Fong Lee began to turn toward him with the gun, and later, when he began to lift the gun toward him.

- *For Plaintiff*: There was no trace evidence found on the gun conclusively linking the gun to Fong Lee. *Against Plaintiff*: Forensic scientists testified that trace evidence is often not found on a gun in a situation like this. One individual testified that fingerprints are found on weapons as little as 12% of the time. Another individual testified that he would have been surprised had a useable print been found on the gun.

- *For Plaintiff*: The autopsy report described some of the bullet wounds to Fong Lee as entering the rear of the body (what Plaintiff's counsel describes as shots in the back). *Against Plaintiff*: The wounds are entirely consistent with Officer Andersen's story that he shot Fong Lee while he was turning toward him. Other wounds were consistent with Officer Andersen's story that he shot at Fong Lee while he was on the ground.

It is clearly within the province of the jury to determine the witnesses' credibility and render a verdict in light of whom they find most believable. Given the multitude of evidence supporting Officer Andersen's version of events, the jury was reasonable in believing Officer Andersen and concluding that an officer in his same position would have felt threatened by Fong Lee.

Plaintiff also argues that the jury improperly considered Defendants' counsel's closing arguments as evidence because Defendants did not call any witnesses to testify that the video showed that Fong Lee had a gun. Plaintiff's counsel misses the point. The question was whether Officer Andersen objectively felt threatened, not whether a video clearly showed that Fong Lee had a gun, even though the video did show that Fong Lee had a gun. Further, the video itself was admitted into evidence. The jury's verdict is reasonably based on the evidence and Plaintiff's motion must be denied.

6. Testimony of Adams and Garcia

Plaintiff's counsel attempted to argue in closing arguments that Defendants' failure to call Officer Tony Adams could be adversely interpreted against Defendants. The Court sustained Defendants' objection to this argument. Allowing Plaintiff's counsel to comment on Defendants' failure to call a witness that was equally available to Plaintiff inappropriately shifts the burden of persuasion from Plaintiff to Defendants. *See Johnson v. Richardson*, 701 F.2d 753, 757 (8th Cir. 1983) (Missouri law); *Fischer v. Mart*, 308 Minn. 218, 220 (1976) (Minnesota law). Plaintiff's counsel could have, and apparently intended to, call Officer Adams but failed to do so, even though Officer Adams's testimony was "a key part of Plaintiff's case in chief." (Pl.'s Mem. at 8.) Plaintiff's counsel has not offered the Court a justification for failing to call Officer Adams. Allowing Plaintiff's counsel to raise a negative inference because Defendants did not call the same witness would have unfairly prejudiced Defendants.

Plaintiff also objects to the Court's ruling prohibiting the introduction of a statement by Sergeant Jesse Garcia that he did not see a gun in the video. The Court did not exclude the statement because it was not a party admission; rather, the statement was excluded because it was irrelevant. The City of Minneapolis could be liable for Officer Andersen's actions only because of its employment relationship with Andersen. Whether or not the City admitted through Sergeant Garcia that the security camera footage

failed to show a gun was wholly irrelevant to whether the City was vicariously liable for Andersen's actions. Moreover, Sergeant Garcia could not make an admission on behalf of Officer Andersen because he was not his agent. Neither of the Court's rulings regarding Officer Adams or Sergeant Garcia warrant a new trial.

7. The Court's Conduct

Finally, Plaintiff argues that the Court was biased against Plaintiff's counsel and, through its conduct, deprived Plaintiff of a fair trial. Plaintiff's counsel takes issue with the Court's reprimand regarding the photograph, although counsel also argues that the Court's non-specified "overt" conduct also prejudiced the jury.

The Court appreciates that Plaintiff's counsel was likely embarrassed by the public reprimand, and that Plaintiff's counsel may have felt it necessary to be more careful during the remainder of the trial to avoid making any additional egregious errors. What Plaintiff's counsel apparently does not appreciate, however, is how much patience and restraint the Court exercised over the course of trial. The Court did not lose its temper, display "extreme emotion," or otherwise conduct itself in any way that was not an appropriate response to the situation. In fact, the Court permitted Plaintiff's counsel to finish examining the witness who was on the stand when the photograph was shown, before dismissing the jury for the day. The Court does not doubt that it would have

been fully justified in declaring a mistrial on its own motion after Plaintiff's counsel displayed a graphic picture of Fong Lee's body, causing an emotional outburst in the courtroom that surely impacted the jury. Plaintiff's counsel certainly appreciated the impact that photo would have on the jury, given that they specifically requested a voir dire question regarding potential jurors' ability to handle viewing such photos. That Plaintiff's counsel characterizes their mistake as a "technical error of procedure" is further evidence that they simply do not grasp the seriousness of their mistake. (Pl.'s Mem. at 9.) Plaintiff's counsel's argument that the Court should have somehow toned down its reprimand because the media was present in the courtroom is particularly ironic. This case was tried to the media long before it ever reached the courtroom, and Plaintiff's counsel was not shy then about the public attention the case was receiving.

Plaintiff's counsel's argument that the jury was somehow tainted by the Court's reprimand is entirely baseless. The Court dismissed the jury and waited until each member of the jury had left the room before reprimanding counsel the day the error occurred. And the Court reprimanded counsel the next day before the jury entered the courtroom. The Court's comments made outside of the presence of the jury did not prejudice Plaintiff. *See Harris v. Steelweld Equip. Co.* 869 F.2d 396, 401 (8th Cir. 1989). Plaintiff's counsel does not specify a single instance when the Court displayed impatience,

partiality, bias, or hostility toward or against Plaintiff's counsel in front of the jury. Nor does Plaintiff's counsel point to any specific instance when the Court conducted itself in any but a dignified manner. Plaintiff's counsel speculates that the Court's reprimand might have "trickled back to the jury, inadvertently," and that it "could have impacted the verdict." (Pl.'s Mem. at 9). Without even so much as a shred of evidence, the Court declines to order a new trial based on Plaintiff's counsel's speculation as to what might have occurred.

Perhaps most jarring is Plaintiff's counsel's contention that the Court should have given "specific instructions or guidance in terms of how to display graphic pictures, and did not instruct counsel that a warning had to be first given to the court so the court could warn the jury." (Pl.'s Mem. at 10.) In nearly 30 years on the federal bench this Court has never found it necessary to instruct counsel that prior to displaying to the jury a graphic picture of a dead body, it would be a good idea to offer it into evidence first. It is a matter of common sense that pictures of such a graphic nature should be prefaced or put into context before being displayed. It is not the Court's role to supervise the attorney-client relationship, but the Court finds it a travesty that such a picture was sprung on Fong Lee's mother and family without warning by the attorneys that were supposed to be representing her best interests. That Plaintiff's counsel needed to be instructed on how to treat as

delicate a subject as pictures of Plaintiff's deceased son simply defies belief.

Nothing the Court said or did warrants a new trial. Further, none of the supposed errors of the Court in the aggregate warrant a new trial.

CONCLUSION

Plaintiff is not entitled to a new trial, nor is she entitled to judgment notwithstanding the verdict.

Accordingly, **IT IS HEREBY ORDERED** that Plaintiff's Motion for JNOV or a New Trial (Docket No. 146) is **DENIED**.

Dated: Friday, June 26, 2009

/s/ Paul A. Magnuson
Paul A. Magnuson
United States District
Court Judge

UNITED STATES DISTRICT COURT

District of Minnesota

Youa Vang Lee

V.

Officer Jason Andersen,
City of Minneapolis

JUDGMENT IN A CIVIL CASE

(Filed May 28, 2009)

Case Number:
07-1205 PAM/JSM

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT:

Judgment is in favor of Defendants.

May 28, 2009
Date

RICHARD D. SLETTEN, CLERK

s/LP Holden

(By) LP Holden, Deputy Clerk

s/Paul A. Magnuson
Paul A. Magnuson, Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 09-2771

Youa Vang Lee, trustee for the heirs and next-of-kin of Fong Lee, Decedent

Appellant

v.

Officer Jason Andersen and City of Minneapolis

Appellees

Appeal from U.S. District Court for the District of Minnesota – Minneapolis (0:07-cv-01205-PAM)

ORDER

The court's order of 09/13/2010, was entered in error and is hereby vacated.

The appellant's motion to recall the mandate and for an extension of time to file a petition for rehearing is denied.

Appellant's petition for rehearing and for rehearing en banc will not be considered by the court.

September 16, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

28 U.S.C. § 1983 Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused – *In a criminal case, evidence* of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim – *In a criminal case, and subject to the limitations imposed by Rule 412, evidence* of a pertinent trait of character of the alleged victim of the

crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness – Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or

education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Notes

Rule 704. Opinion on Ultimate Issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise

admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

No. 10-492

In The
Supreme Court of the United States

YOUA VANG LEE, Trustee for the Heirs and Next-of-Kin of Fong Lee, Decedent,

Petitioner,

v.

OFFICER JASON ANDERSEN and THE CITY OF MINNEAPOLIS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Eighth Circuit Court of Appeals erred when it ruled that evidence of Decedent Fong Lee's gang affiliation should have been excluded under Fed. R. Civ. P. 403, but that, in light of all the evidence presented during the trial, and Respondent's limited use of gang affiliation, admission of the evidence did not affect Petitioner's substantial rights or have more than a slight influence on the verdict.

II. Whether the District Court erred by placing a factual predicate question regarding qualified immunity on the special verdict form, and whether that error was mooted by the fact that the jury never answered the qualified immunity factual predicate question because it found in Respondent's favor on general liability.

III. Whether the District Court, applying Fed. R. Civ. P. 702, properly prohibited Petitioner's purported expert from testifying as to what he saw in seven vidéo still images, because the expert stated that he did not employ any specialized knowledge or skill in determining what he saw in the images, and the jury was equally capable of making its own determination.

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OPINIONS BELOW

The United States Court of Appeals for the Eighth Circuit issued its opinion on August 12, 2010. *Youa Vang Lee v. Andersen*, 616 F.3d 803 (8th Cir. August 12, 2010).[1] The opinion is reproduced in Petitioner's Appendix starting at App. 1. The United States District Court for the District of Minnesota denied Petitioner's Motion for Amendment (JNOV) and/or New Trial on June 26, 2009. The District Court's Memorandum and Order is reproduced in Petitioner's Appendix starting at App. 24.

STATEMENT OF JURISDICTION

Petitioner incorrectly states that this Court has jurisdiction to review the Judgment of the Eighth Circuit Court of Appeals, entered on August 12, 2010, pursuant to 28 U.S.C. § 1245(1). *See* Petition at 1. This Court has jurisdiction to review the Eighth Circuit's judgment pursuant to 28 U.S.C. § 1254(1).

[1] Petitioner incorrectly cites the Eighth Circuit's opinion in this matter as the unreported "2010 WL 3168627." The correct citation to the opinion of the Eighth Circuit Court of Appeals is stated above.

STATEMENT OF THE CASE

I. The Petition misstates the facts adduced at trial

Pursuant to Sup. Ct. R. 15(2), Respondent must correct the misstatements of fact alleged in the Petition. Contrary to Petitioner's assertions, the evidence clearly supported the jury's verdict. Petitioner presents a skewed view of the facts that is not supported by competent evidence. The jury rejected similar arguments after hearing almost six days of testimony.

a. Corrections to Petitioner's facts

On pages 2-3 of the Petition, Petitioner implies that the officers improperly approached the group of bicyclists, including Decedent Fong Lee. In fact, Officer Andersen, and his partner for the evening, Trooper Benz, had their squad car windows down and tried to talk to the bicyclists to make citizen contact, an accepted police practice. Trial Transcript p. 389. Nhia Lor, one of the bicyclists, confirmed that one of the officers even said "[h]ey guys" as the squad car caught up with the group. Transcript p. 528. Lor testified that he saw Lee, who was riding ahead of him, look back at the squad car. Transcript p. 534.

The evidence also established that the officers saw Lee with a handgun before the shooting. Lee's fellow bicycle riders, and the officers agreed that Fong Lee and Tou Xiong were ahead of the squad car and at one point came together. Transcript pp. 346; 391-392; 477; 534-535. The Petition omits the

important fact that both Officer Andersen and Trooper Benz saw Lee and another bicyclist exchange an item when they came together. Transcript pp. 346; 391-92. Benz was initially unable to determine what the young men exchanged, but Andersen saw that it was a gun. Transcript pp. 346; 391-392. Lor heard an officer say "He's got a gun." Transcript p. 535. At that point, Lor testified that "boom, the police just took the car right off the curb and started chasing Phong [sic Fong]." *Id.* Andersen confirmed that he yelled "He's got a gun." Transcript pp. 346.

Petitioner's statement, "[w]ithout provocation, Andersen hit Fong Lee with his police car, knocking Fong Lee off his bike," is not supported by the evidence. Petition at 3. At trial, Respondent clearly established that Lee dropped his bicycle and started running away from the squad car. The squad car never got closer than ten feet from Lee while he was on his bicycle. Petitioner's first witness at trial, Vajying Vou, testified on direct examination that he saw the squad car strike Lee on his bicycle, knocking Lee and his bicycle to the ground. Transcript pp. 57-58. However, after viewing the security camera footage depicting the squad car and Lee on a bicycle, Vou agreed that Lee dropped his bicycle and ran. Transcript pp. 63-65; Trial Exhibit 14. Vou agreed that the squad car never got closer than ten feet from Lee. *Id.* Both Andersen and Benz testified that after receiving an item from his fellow rider, Lee rode a

while, dropped his bicycle voluntarily, and ran. Transcript pp. 346; 392-393. Phong Xiong was shown the surveillance video and admitted that he was wrong when he earlier testified that the squad car hit Lee's bicycle. Transcript p. 502. It is clear that the squad car never made contact with or hit Lee or his bicycle. Transcript pp. 60-65; 500-502; Trial Exhibit 14; App. 27, 36.

Contrary to Petitioner's claims, Respondent presented substantial evidence indicating that Lee possessed a gun in the moments prior to his death. Once he started the foot-chase, Andersen broadcast on his police radio: "442 chasing one with a gun." Transcript p. 351; Trial Exhibit 2. As the foot chase began, Benz saw that the object Lee was carrying was a gun, shouting "gun" and "police" as Lee ran away. Transcript p. 393. When Andersen chased Lee around the school, Lee turned towards Andersen with the gun clearly visible in his hand. Transcript p. 354. At this point, Andersen felt that his life was threatened and fired one shot. Transcript p. 354. The assertion on page 4 of the Petition that Andersen first fired a volley of three shots is incorrect. Andersen's first round hit the dirt, not striking Lee. Transcript p. 354.

The chase continued around the school into a dead end area where Lee again turned towards Andersen with a gun in his hand. Transcript pp. 356-357. Andersen felt his life was in danger and fired three shots, knocking Lee to the ground. Transcript pp. 357-358. Lee, still with the gun in his hand, tried to get up and Andersen fired five more shots at Lee

until Lee fell backwards and the gun flew out of Lee's hand. Transcript pp. 358-359.

Petitioner's description of Lee's injuries inappropriately implies that Lee was not a threat when Andersen shot him. Petition, p. 4. The injuries described in the autopsy report closely correlate to Andersen's testimony about Lee's actions. The District Court observed that "[t]he wounds are entirely consistent with Officer Andersen's story that he shot at Fong Lee while he was turning toward him. Other wounds are consistent with Officer Andersen's story that he shot at Fong Lee while he was on the ground." App. 37.

b. The crime scene evidence is consistent with Andersen's testimony.

Petitioner's assertion that the crime scene evidence is inconsistent with Andersen's testimony ignores the evidence that was presented at trial. *See* Petition at 4. First, Petitioner's statement that the school "video does not show that Fong Lee was holding a weapon," is contrary to the evidence. Petition at 4. The school surveillance video of the beginning of the chase showed that Lee had a gun as he ran from the officers. Transcript pp. 936-937 (describing Trial Exhibit 14). The District Court agreed, stating that "[a]nother segment of the video that Plaintiff's counsel apparently had not looked at did show that Fong Lee had a gun." App. 28. Later, the District Court

observed that the " . . . video did show that Fong Lee had a gun." App. 37.

Petitioner's claim that the gun recovered at the scene had been in Minneapolis Police custody before the shooting is contrary to the evidence presented at trial. *See* Petition at 5. The supervisor for the Minneapolis Police Department Property and Evidence Room reviewed records and testified that the gun recovered next to Lee was never in the City's custody prior to the shooting. Transcript pp. 246-247. The jury apparently found the supervisor's testimony credible. Similarly, the District Court concluded that " . . . the evidence overwhelmingly showed that the City never had the gun in its possession until after the Fong Lee shooting." App. 28.

Petitioner's implication that the lack of trace evidence on the recovered gun is inconsistent with Andersen's testimony, was disproven as well. Petition, p. 5. The District Court summarized the testimony about trace evidence well. It stated:

> *For Plaintiff:* There was no trace evidence found on the gun conclusively linking the gun to Fong Lee. *Against Plaintiff*: Forensic scientists testified that trace evidence is often not found on a gun in a situation like this. One individual testified that the fingerprints are found on weapons as little as 12% of the time. Another individual testified that he would have been surprised had a useable print been found on the gun.

App. 36.

II. Procedural history and opinions below

Following a six day trial, the jury rendered a verdict finding that Officer Jason Andersen did not use excessive force against Fong Lee. App. 2. The District Court entered Judgment in favor of Jason Andersen, and denied Petitioner's subsequent motion for a new trial. App. 2; App. 24. The District Court's judgment was affirmed by the Eighth Circuit Court of Appeals on August 12, 2010. App. 1. Judgment by the Eighth Circuit was entered on August 12, 2010, and a Mandate was issued on September 2, 2010. App. 20; App. 23.

REASONS TO DENY THE WRIT

Petitioner has presented no compelling reason to grant the Writ of Certiorari. Sup. Ct. R. 10 states:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; . . . ;

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

None of the enumerated reasons articulated in Sup. Ct. R. 10 apply to this matter. Petitioner's request for review is a request to overturn rulings she disagrees with. She has proffered no compelling reasons to further develop or clarify the controlling precedence on any issue.

I. The petition seeks a reweighing of the evidence, not new Court direction regarding the admissibility of gang membership evidence in civil trials.

Petitioner seeks review of the Eighth Circuit Court of Appeals' finding of harmless error in the introduction of evidence of Lee's gang membership. Petition at 12. This request is contrary to the

direction given in Sup. Ct. R. 10, that the Writ of Certiorari should be granted "only for compelling reasons." Weighing whether an error is harmless or not is not a compelling reason, and not one of the reasons articulated in the rule.

The Rules of Civil Procedure embody the principle that errors in evidentiary rulings should not disturb verdicts in Fed. R. Civ. P. 61.

> [N]o error admitting or excluding evidence . . . is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

Fed. R. Civ. P. 61. "[I]t is well-settled that the appellate courts should act in accordance with the salutary policy embodied in Rule 61." *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554, 104 S.Ct. 845, 849 (1984).

The harmless error rule is set forth in 28 U.S.C. § 2111 which states that Courts are to give their judgment "without regard to the errors or defects which do not affect the substantial rights of the parties." "To constitute reversible error, it must be established that the error complained of affected the substantial rights of the objecting party." *Gilliam v. City of Omaha*, 524 F.2d 1013, 1015 (8th Cir. 1975), *citing Palmer v. Hoffman*, 318 U.S. 109, 116, 63 S.Ct.

477 (1943); 28 U.S.C. § 2111; Fed. R. Civ. P. 61. "[I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." *Kotteakos v. U.S.*, 328 U.S. 750, 765, 66 S.Ct. 1239, 1248 (1946).

By its very nature, an inquiry into whether an erroneous evidentiary ruling was harmless is fact specific to the case, and in many circumstances, calls for a thorough evaluation of the entire record. Petitioner argues that harmless error cannot be found because "the trial [was] close." Petition at 12. She then offers the better part of five and one half pages of argument about what the evidence showed at trial. *See generally* Petition, at 12-17 (discussing evidence at trial and case law on admissibility of gang membership). As discussed *supra*, the Petition does not accurately reflect the evidence presented at trial.

Contrary to Petitioner's assertions, the limited use of gang membership evidence was harmless in the light of the body of evidence presented at trial. The evidence overwhelmingly supported Respondent's version of events. Lee's own friends acknowledged that Lee and Xiong came together while riding their bicycles. Transcript pp. 477; 534-535. Xiong gave Lee a gun when they came together. Transcript pp. 346;

391-392. Lee fled the squad car by dropping his bicycle and running away on foot as the car approached. Transcript pp. 63-65; Trial Exhibit 14. The surveillance footage showed Fong Lee holding a gun during the chase. Transcript p. 936 (describing Trial Exhibit 14). The images relied upon by Plaintiff were unclear as to gun possession at best. App. 27. The evidence proved that the gun found next to Fong Lee had never been in police department custody before the date of the shooting, refuting Plaintiff's fanciful theory that the gun was planted by unnamed police officers.

The Eighth Circuit agreed that the evidence in favor of the verdict was strong, ruling:

> When viewed in light of the evidence presented over the course of the six day trial, we conclude that the gang affiliation testimony and defense counsel's limited use thereof during closing argument did not affect Lee's substantial rights or have more than a slight influence on the verdict.

App. 14.

"A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Petitioner is asking this Court to conduct its own review of the evidence in a case where the evidence strongly favored Respondent. A review of the evidence regarding the "harmlessness" of the error, if any, is not a compelling reason to grant the Writ of Certiorari.

II. The qualified immunity factual predicate question was moot, as the jury did not answer the question.

Any error in the factual predicate question on the Special Verdict Form was mooted by the jury's verdict in favor of Respondent on the question of general liability for excessive force. "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287, 120 S.Ct. 1382, 1390 (2000), *quoting County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379 (1979). In such a case, any ruling on the challenged question would be a disfavored advisory opinion. *Alabama v. Shelton*, 535 U.S. 654, 676, 122 S.Ct. 1764, 1777 (2002). Andersen's defense of qualified immunity became moot when the jury ruled in his favor on Question 1, the general question of constitutional liability. *See City of Los Angeles v. Heller*, 475 U.S. 796, 798, 106 S.Ct. 1571, 1572 (1986) (*per curiam*) (affirming District Court's decision to that of a jury decision in favor of officers on the general question of § 1983 liability, mooted any later inquiry into municipal liability or qualified immunity).

In reviewing jury instructions, the Court assumes that "juries act in accordance with the instructions given them, . . . and they do not consider and base their decisions on legal questions with respect to which they are not charged." *Heller*, 476 U.S. at 798, 106 S.Ct. at 1573, *citing Aspen Skiing Co. v. Aspen*

Highlands Skiing Corp., 472 U.S. 585, 604, 105 S.Ct. 2847, 2858 (1985).

The instructions on the special verdict form stated:

> If you answered "Yes" to Question No. 1, then proceed to Question No. 2. If your answer to Question No. 1 is "No," then sign and date this Special Verdict Form without answering any additional questions.

Resp. App. 1.

The jury answered "No" to question No. 1, and followed the instructions to sign and date the Special Verdict Form without answering any further questions. Resp. App. 1. The challenged question regarding the factual predicate to qualified immunity was rendered moot by the jury's answer to Question No. 1. Review of a moot question is not compelling grounds for granting the Writ of Certiorari under Sup. Ct. R. 10.

III. There is no compelling reason to justify granting the Writ of Certiorari to review the lower courts' findings that Petitioner's expert was unqualified to provide expert opinion on the contents of still video images.

Petitioner contends that the District Court and the Court of Appeals erred when they ruled on the admissibility of expert witness Richard Dierks'

opinions on whether Lee had a gun in his hand during the chase. Petition at 30-34. Error, if any, in an evidentiary ruling is not a compelling reason to grant Petitioner's writ. None of the enumerated criteria for granting the writ under Sup. Ct. R. 10 apply. Petitioner has not argued or presented evidence that the rulings on expert admissibility conflict with other courts of appeals. Sup. Ct. R. 10(a). Sup. Ct. R. 10(b) does not apply because this case was tried entirely in federal court. Nor has Petitioner demonstrated that the opinion of the Eighth Circuit Court of Appeals conflicts significantly with the Supreme Court's opinions on the issue. Sup. Ct. R. 10(c). Petitioner does not even identify a potential conflict between the Eighth Circuit ruling and any relevant decisions of this Court.

Decision on the admission of expert testimony under Fed. R. Evid. 702 are reviewed under an abuse of discretion standard. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152, 119 S.Ct. 1167, 1176 (1999). In this matter, the District Court considered Petitioner's expert Richard Dierks' qualifications, and found his testimony on image manipulation admissible, but excluded him from testifying about what he saw in seven manipulated images because "[Dierks] did not . . . employ any specialized knowledge or skill in determining whether he saw a gun in Fong Lee's hand in the video. He simply looked and explained what he saw. The jury was equally capable of doing the same. . . ." App. 33. The Court of Appeals agreed, finding that " . . . the jury was entirely capable of

analyzing the images and determining whether Fong Lee had anything in his hands." App. 11.

When asked at deposition to describe how he came to the conclusion that Lee had no gun in his hand in the seven clarified images, Dierks responded:

> I believe that a reasonable person looking at the clarified photograph and looking at Fong Lee's hand would conclude that his hand does not have a firearm in it.

App. 10.

Deciding whether Dierks was qualified to provide expert testimony regarding the contents of the video still images was squarely within the District Court's discretion. The Petition provides no argument or case law which demonstrates that the District Court's alleged error was so egregious as to be an abuse of discretion. Rather, Petitioner reiterates and expands on the arguments she made to the District Court when it made its decision. *See*, Petition at 31-34. Petitioner is asking this Court to conduct its own review and weigh Dierks' alleged expertise against his admission that he uses the same methods as a reasonable person does in interpreting the contents of photographs. This is the same type of weighing of competing factors that abuse of discretion review is meant to protect. Petitioner has presented no injustice or even the type of error which would justify overturning the lower courts' decisions under an

abuse of discretion analysis. Petitioner fails to offer a compelling reason to obtain Supreme Court review.

CONCLUSION

The Petition for Writ of Certiorari should be denied because no compelling reasons exist to subject the Eighth Circuit Court of Appeals decision to Supreme Court review. Review of the Circuit Court's decision that admission of gang evidence is harmless error is a fact specific inquiry that is not a compelling reason to grant the Writ of Certiorari. Review of the qualified immunity factual predicate question would result in an advisory opinion regarding a moot question. Finally, there is no compelling reason for this Court to review the lower courts' decision on the admissibility of certain elements of Petitioner's expert testimony.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Youa Vang Lee, trustee for the heirs and next-of-kin of Fong Lee, Decedent, Plaintiff, v. Officer Jason Anderson [sic] and the City of Minneapolis; Defendants.	Court File No. 07-1205 (PAM/JSM) **SPECIAL VERDICT FORM** (Filed May 29, 2009)

Members of the Jury:

The following Questions are to be answered by you. Your answer to each Question must be unanimous. In order to answer "Yes" to Question No. 1, you must find that Plaintiff Youa Vang Lee, trustee for the heirs and next-of-kin of Fong Lee, Decedent, has established the claim described in Question No. 1 by the preponderance of the evidence.

1. Do you find by a preponderance of the evidence in favor of Plaintiff Youa Vang Lee, trustee for the heirs and next-of-kin of Fong Lee, Decedent, and against Defendant Officer Jason Andersen on the claim of excessive force?

   Answer: Yes ____ No _X_

   If you answered "Yes" to Question No. 1, then proceed to Question No. 2. If your answer to Question No. 1 is "No," then sign and date this Special

Verdict Form without answering any additional questions.

2. Was Defendant Officer Jason Andersen objectively reasonable in his belief that his use of deadly force was necessary to protect himself or another from apparent death or great bodily harm?

   Answer: Yes ____ No ____

   Please proceed to Question No. 3.

3. What sum of money, if any, will fairly and adequately compensate Youa Vang Lee, trustee for the heirs and next-of-kin of Fong Lee, Decedent, for her damages?

   $_____

   Please proceed to Question No. 4.

4. Do you find that Defendant Officer Jason Andersen was malicious or recklessly indifferent to Fong Lee's constitutional right to be free from the use of excessive force?

   Answer: Yes ____ No ____

   If your answer to Question No. 4 is "Yes," please proceed to Question No. 5. If your answer to Question No. 4 is "No," then sign and date this Special Verdict Form without answering any additional questions.

5. Defendant Officer Jason Andersen is assessed punitive damages in the amount of $_____ (if none, write the word "none").

Dated: 5/28/09

_____

28 U.S.C. § 2111. Harmless error

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

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28 U.S.C. § 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

Fed. R. Civ. P. 61. Harmless Error

Unless justice requires otherwise, no error in admitting or excluding evidence – or any other error by the court or a party – is ground for granting a new trial, for setting aside a verdict, or for vacating,

modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.